Supreme Court, U.S.
FILED
OCT 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-666

No. 85-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC.,
and THE HUDSON DISPATCH,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD W. BECKLER *
KEITH A. JONES
DAVID M. FOSTER
STEPHEN M. MCNABB
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may penalize a company for failing to bargain with a labor union when (a) the union had refused to deal with the company and (b) the Board had designated a different company as the statutory employer with the duty to bargain.

2. Whether the legal standard for determining the existence of an employment relationship under the National Labor Relations Act is different from the one applied by this Court under the Federal Employers' Liability Act in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974).

3. Whether, when the National Labor Relations Board applies an incorrect legal standard in finding an employment relationship, a reviewing court nevertheless may approve the Board's finding on the ground that substantial evidence would have supported such a finding under the presumptively correct standard.*

---

* The caption of the case in this Court contains the names of all parties to the proceeding in the court of appeals except Local 103 of the International Typographical Union, AFL-CIO.

Petitioners News Printing Company, Inc., and The Hudson Dispatch, which have no subsidiaries, are wholly owned by petitioner Allbritton Communications Company, which in turn is wholly owned by Perpetual Corporation. The petitioners have no non-wholly owned subsidiaries and no affiliates other than Perpetual Corporation and its wholly owned subsidiaries and sub-subsidiaries.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED	2
STATEMENT	2
REASONS FOR GRANTING THE PETITION	7
1. The decision below conflicts with decisions of this Court and other courts of appeals on a fundamental question relating to the duty to bargain	8
2. The decision below and this Court's decision in *Kelley* establish conflicting standards of employment	12
3. The decision below violates a basic rule of administrative law	14
CONCLUSION	17

TABLE OF AUTHORITIES

CASES: Page

Alaska Roughnecks and Drillers Association v. Mobil Oil Corp., 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978) ..... *passim*
Allbritton Communications Company v. NLRB, 766 F.2d 812 (3d Cir. 1985) 1
First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) 14
Hilton International v. NLRB, 690 F.2d 318 (2d Cir. 1982) 15
International House v. NLRB, 676 F.2d 906 (2d Cir. 1982) 9
Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) ..... *passim*
Lodge 1858, American Federation of Government Employees v. Webb, 580 F.2d 496, 504-08 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978) 13
Medo Photo Supply Corp. v. NLRB, 321 U.S. 678 (1944) 8
NLRB v. Allbritton Communications Company, 271 N.L.R.B. No. 39 (1984) 1
NLRB v. Associated Diamond Cabs, 702 F.2d 912 (11th Cir. 1983) 15
NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939) ..... *passim*
NLRB v. Island Typographers, Inc., 705 F.2d 44 (2d Cir. 1983) 8, 12
NLRB v. Jordan Bus Co., 380 F.2d 219 (10th Cir. 1967) 9
NLRB v. Pipefitters, 429 U.S. 507 (1977) 15
NLRB v. Spun-Jee Corp., 385 F.2d 379 (2d Cir. 1967) 8
NLRB v. United Insurance Co., 390 U.S. 254 (1968) 13
SEC v. Chenery Corp., 318 U.S. 80 (1943) 7-8
SEC v. Chenery Corp., 332 U.S. 194 (1947) 14
Struthers Wells Corp. v. NLRB, 721 F.2d 465 (3d Cir. 1983) 8

TABLE OF AUTHORITIES—Continued

STATUTES AND CONSTITUTION:	Page
U.S. Const. amend. V	2
28 U.S.C. § 1254(1) (1982)	1
National Labor Relations Act, *as amended*, § 8, 29 U.S.C. § 158 (1982)	4
National Labor Relations Act, § 8(a)(5), 29 U.S.C. § 158(a)(5) (1982)	2, 8
National Labor Relations Act, *as amended*, § 9(c)(1), 29 U.S.C. § 159(c)(1) (1982)	2
National Labor Relations Act, *as amended*, § 10, 29 U.S.C. § 160 (1982)	5
CODE OF FEDERAL REGULATIONS:	
29 C.F.R. §§ 102.60-.72 (1985)	2
29 C.F.R. § 102.61 (1985)	9
OTHER:	
Restatement (Second) of Agency § 2(2)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC.,
and THE HUDSON DISPATCH,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals (App. A) is reported at 766 F.2d 812 (3d Cir. 1985).[1] The decision and order of the National Labor Relations Board (App. B), which incorporate the decision of its administrative law judge, are reported at 271 N.L.R.B. No. 39 (1984).

JURISDICTION

The judgment of the court of appeals (App. C) was entered on August 6, 1985. A timely petition for rehearing was denied on September 3, 1985 (App. D). This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1) (1982).

---

[1] "App." refers to the separately bound Appendix which accompanies this petition.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1982), provides in pertinent part:

> It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . .

Section 9(c)(1) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 159(c)(1) (1982), and the Board's regulations governing certification of collective bargaining representatives, 29 C.F.R. §§ 102.60-.72 (1985), are set forth in pertinent part at App. E.

STATEMENT

This case arises out of the relationship between The News Printing Company, Inc. ("The News"), T & T News Company, Inc. ("T & T"), and the Newspaper and Mail Deliverers' Union of New York and Vicinity ("NMDU"). The News publishes a newspaper in Paterson, New Jersey.[2] T & T delivered copies of the newspaper to retailers and distributors pursuant to a contract with The News. The NMDU represents T & T's employees.

The News and T & T are unrelated corporations having no common ownership or control. Under their contract, T & T picked up each day's press run at The News' mailroom and delivery dock and delivered the

---

[2] The News is owned by Allbritton Communications Company, which also owns The Hudson Dispatch. For purposes of this case, these three corporations may be treated as a single unit.

newspapers in trucks leased by The News and bearing The News' logo. The contract provided for a fixed weekly payment to T & T, with an adjustment clause for labor costs. T & T hired, fired, and paid its own employees.

The NMDU has represented T & T's drivers since 1964, when the National Labor Relations Board ("the Board") certified T & T's predecessor, Silk City Distributing Co., as their employer and the NMDU as their collective bargaining representative. Over the years, T & T and the NMDU negotiated a series of collective bargaining agreements covering wages, hours, seniority practices, and other terms and conditions of employment. These agreements were separate from the contracts between T & T and The News and ran for different terms.

During the 1970s, The News suffered a string of substantial operating losses. The News attempted in various ways to restructure operations and restore profitability. For example, The News discontinued its afternoon edition in 1980 and obtained T & T's agreement to seek "the maximum possible reduction of manpower with respect to [T & T's employees] under the NMDU contract then in force." App. B at 90a. The News also tried to meet with the NMDU to enlist the union's assistance in resolving the paper's financial problems. But the NMDU categorically refused to meet with The News, stating:

> We understand that [The News] has a commercial agreement for the delivery of its newspapers with a Wholesaler [T & T] with whom the Union has a contract. Under those circumstances, the Union cannot go behind the Employer with whom it has contracted and negotiate a separate agreement.
>
> Regardless of the financial condition of [The News] we recommend that you conduct discussions with the Wholesaler. It is only if those discussions directly affect contractual obligations of the Whole-

> saler that the Union would become involved and in that event its discussions would be limited to the Wholesaler.

J.A. 1615.[3]

The incident that gave rise to this case occurred a few months thereafter. It concerned the handling of separately printed advertising supplements. T & T's practice had been to place supplements on top of a bundle of newspapers and to deliver them in that manner, charging a separate fee for doing so. Advertisers complained, however, that supplements were lost or never inserted in individual copies of the newspaper and thus were not received by readers. To cure this problem, on February 9, 1981, The News hired its own employees to insert the supplements into individual copies of the newspaper on its premises before delivery by T & T. T & T's employees vehemently objected to this and interrupted the press run. The News ordered T & T from its premises and undertook to make deliveries itself. The NMDU immediately picketed The News and, three days later, its members went on strike. The News continued operations, with newspapers being delivered by its own employees.

On January 18, 1982, the Board's Regional Director filed a complaint against The News, alleging that it had violated section 8 of the National Labor Relations Act, *as amended*, 29 U.S.C. § 158 (1982), by failing to bargain with the NMDU before hiring employees to insert advertising supplements and by ordering T & T from the premises. The complaint rested on the theory that The News employed T & T's employees because T & T was its "agent." J.A. 15. After a hearing, an administrative law judge ("ALJ") ruled that the Board's General Counsel was collaterally estopped from litigating the question

---

[3] "J.A." refers to the joint appendix in the court of appeals. For the Court's convenience, the NMDU's letter is reproduced as App. F.

whether The News was the statutory employer of T & T's employees, because that question had been decided in The News' favor in separate litigation with the NMDU. The ALJ noted, however, that in the absence of collateral estoppel he would have found The News and T & T to be "joint employers." App. B at 106a.

The Board did not accept either the ALJ's conclusion concerning collateral estoppel or his suggestion that The News and T & T were joint employers. Instead, the Board determined that The News was the statutory employer of T & T's drivers because T & T was "the agent of [The News]." App. B at 29a. The Board reasoned that "[t]he relationship between [The News] and T & T exhibited strongly most of the factors commonly associated with agency or employee status." *Id.* at 30a.

Before the Board, The News had argued both that it did not employ T & T's drivers and that, in any event, it could not be held liable for refusing to bargain with the NMDU when the Board had certified T & T's predecessor as the employer and the NMDU had refused to meet with The News. Without addressing the latter issue, the Board simply ordered The News to bargain with the NMDU, to "reinstate" T & T's drivers, and to pay them backpay from 1981.

On petition for review before the United States Court of Appeals for the Third Circuit,[4] The News argued that the Board had confused the concept of "agency" with that of "employment" and, as a consequence, had wrongly held The News to be the statutory employer of T & T's employees solely because T & T was its agent. The News pointed out that, under *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), it could be treated as the employer of T & T's employees only if there was a master-servant relationship between the two companies

---

[4] The jurisdiction of the court of appeals rested upon section 10 of the National Labor Relations Act, *as amended*, 29 U.S.C. § 160 (1982).

and "a finding of agency is not tantamount to a finding of a master-servant relationship." *Id.* at 325. The News also urged the court of appeals to follow *Alaska Roughnecks and Drillers Association v. Mobil Oil Corp.*, 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978). In that case the Ninth Circuit, relying upon *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), held that a company may not be penalized for an alleged refusal to bargain "when it was neither afforded an opportunity to participate in the certification proceedings nor [previously] requested by the union to bargain." 555 F.2d at 735.

The Third Circuit acknowledged, as the Board had not, that under *Kelley* The News could be held liable for a failure to bargain as the statutory employer only upon the finding of a master-servant relationship between The News and T & T. But the court held that such a finding could be based upon a generalized test of agency, *i.e.*, whether The News had "exercised significant control over the conduct of T & T and its employees." App. A at 12a. Although the Board had not applied even that test, at least not explicitly, the court equated the Board's findings with a determination that T & T's drivers "were subservants [*sic*] of T & T which in turn was a servant of [The News], thereby rendering [The News] the statutory employer of the NMDU workers." *Id.* The court stated that such a determination was supported by substantial evidence, citing contested evidence on which the Board had made no findings of fact.

The court of appeals rejected the argument under *Alaska Roughnecks* as "unpersuasive." *Id.* at 15a. Despite the Board's failure to afford The News an opportunity to participate in a prior representation proceeding, and despite the NMDU's previous denial of a bargaining relationship with The News, the court reasoned that "The News asserted effective control over T & T and [its drivers and thus] . . . cannot now be heard to complain [of] the concomitant . . . duty to negotiate and

abide by the terms of the existing collective bargaining agreement . . . ." *Id.* at 15a-16a.

REASONS FOR GRANTING THE PETITION

The judgment below, holding that a company may be penalized for failing to bargain with a labor union even though the union had refused to deal with it and the Board had designated another company as the statutory employer, conflicts with both *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), and *Alaska Roughnecks and Drillers Association v. Mobil Oil Corp.*, 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1609 (1978). This Court should grant review to resolve this conflict on a fundamental question relating to the duty to bargain under the National Labor Relations Act ("NLRA").

In addition, the court of appeals applied the wrong legal standard in determining that The News is the statutory employer of T & T's employees. Although the court's opinion pays lip service to the requirement of a master-servant relationship between the two companies, as required in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), the court in fact applied the test that was proposed by the dissenters and rejected by the majority in *Kelley*. This Court should grant certiorari to clarify that the common law test of employment applied under the Federal Employers' Liability Act ("FELA") by the majority in *Kelley* also applies under the NLRA.

Moreover, in affirming the Board's decision that The News was the statutory employer of T & T's employees—a decision reached by the Board without first finding a master-servant relationship between The News and T & T under any legal standard—the court of appeals violated the well-established principle that "an order may not stand if the agency has misconceived the law." *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943). This Court should take the case to reaffirm the continuing vitality of that basic rule of administrative law.

1. *The decision below conflicts with decisions of this Court and other courts of appeals on a fundamental question relating to the duty to bargain.* The statutory duty to bargain under section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), presupposes the existence of an established bilateral relationship. In addition to an employer, there must be an employees' representative who is willing and able to bargain in return. If the employees have no representative, or if the representative refuses or is unwilling to bargain or otherwise waives the right to bargain, the employer has no duty to bargain collectively and indeed cannot do so.[5]

These considerations form the very bedrock of the duty to bargain. As this Court explained in the seminal decision of *Columbian Enameling*:

> Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain.

306 U.S. at 297. It follows that "a union cannot simply ignore its responsibility to initiate bargaining over subjects of concern and thereafter accuse the employer of violating its statutory duty to bargain." *NLRB v. Island Typographers, Inc.*, 705 F.2d 44, 51 (2d Cir. 1983). *Accord Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 472 (3d Cir. 1983); *NLRB v. Spun-Jee Corp.*, 385 F.2d 379, 384 (2d Cir. 1967).

The certification process reflects the central importance of prior notice to the employer of the existence of

---

[5] The duty to bargain arises only when the employees have designated a bargaining representative and demanded bargaining. By statute, the representative is "exclusive." 29 U.S.C. § 159(a). The employer may not bargain with anyone other than the representative, including the employees themselves. *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

a representative who is willing and able to bargain. An employer is entitled, by statute and regulation, to notice and an opportunity to participate in a proceeding to certify a union as the collective bargaining representative of its employees. 29 U.S.C. § 159(c)(1); 29 C.F.R. §§ 102.61, .63 (1985). The employer also is entitled to notice and hearing whenever a union seeks to amend an existing certification. *Id.* Thus, the Board's own regulations contemplate that an employer will have notice and an opportunity to be heard *before* it becomes charged with the duty to bargain.

Indeed, because the duty to bargain arises in the context of an established bilateral relationship, notice of the existence of such a relationship becomes a matter of constitutional significance. As a matter of due process, a company has no duty "to bargain with the union when it was neither afforded an opportunity to participate in the certification proceedings nor requested by the union to bargain." *Alaska Roughnecks*, 555 F.2d at 735. *Cf. International House v. NLRB*, 616 F.2d 906, 911 (2d Cir. 1982); *NLRB v. Jordan Bus Co.*, 380 F.2d 219, 223 (10th Cir. 1967).

The decision below ignores these principles and directly conflicts with both *Columbian Enameling* and *Alaska Roughnecks*. The Board has never designated The News as the employer of T & T's employees in a certification proceeding. In the only certification proceeding involving those employees, the Board designated T & T's predecessor, Silk City Distributing Co., as the employer. The News had no notice or opportunity (or reason) to participate in that proceeding.

The court below nevertheless sought to justify its decision on the ground that "in 1977, The News asserted effective control over T & T . . . ." App. A at 15a. Neither the Board's decision nor the record supports the court's assertion that, in either 1977 or at any other time, a significant change occurred in the relation-

ship between The News and T & T that warranted an amendment to the NMDU's certification. But if such a change had occurred, the NMDU's recourse was to initiate a proceeding to have The News designated as the employer. The NMDU did not do so. The NMDU never took any action to give The News formal or even casual notice that it would be looked to as an employer with the duty to bargain.

In fact, the NMDU did precisely the opposite. It denied that it had any bargaining relationship with The News. When The News sought to meet with the NMDU to discuss ways in which operations could be revised to reduce costs, it was rebuffed. Through its attorney, the NMDU firmly stated that T & T, not The News, was the statutory employer; the NMDU refused to conduct any discussions whatsoever with The News. App. F. It was only after The News had taken the actions giving rise to this case—hiring employees to insert advertising supplements on its own premises and ordering T & T off the premises when T & T's employees physically interfered with The News' press run—that the NMDU claimed that The News had a prior obligation to bargain. This was a startling reversal of direction: for the previous seventeen years, the NMDU had asserted that T & T, not The News, was its members' employer.

The Board and the Third Circuit should not have rewarded the NMDU for playing this cat-and-mouse game. It was plain error to penalize The News for failing to bargain. Because "there can be no breach of the statutory duty by the employer . . . without some indication given to him by [his employees] or their representatives of their desire or willingness to bargain," *Columbian Enameling*, 306 U.S. at 297, and because a company has no duty to bargain "when it was neither afforded an opportunity to participate in the certification proceedings nor requested by the union to bargain," *Alaska Rough-*

necks, 555 F.2d at 735, neither this Court nor the Ninth Circuit would have upheld the Board's order in this case.

The duty to bargain may be the central obligation imposed by the NLRA. It is important that the rules relating to this duty be clear, understandable, and consistently administered. Simple equity demands no less. Here, the Board had designated T & T's predecessor as the employer, and the NMDU had denied the existence of any bargaining relationship between itself and The News. In these circumstances, it would be unreasonable to expect The News to recognize, let alone fulfill, a statutory duty to bargain over the handling of advertising supplements. It is markedly unfair to saddle The News with four years of backpay liability for doing nothing more than the NMDU had insisted it must do, *i.e.*, act on its own without the benefit of prior discussions with the union.

A major federal regulatory program should not hinge upon a duty that cannot be reasonably ascertained in advance. Whenever the NLRA is enforced in a manner that requires one company to bargain with another company's employees, confusion and uncerainty will reign unless clear rules permit determination of the existence of the duty in advance. In the absence of a certification proceeding, a company often cannot determine whether the Board will later deem it to be the employer of another company's employees. Likewise, the representative of those employees cannot know what legal rights and duties they have vis-a-vis that company. There is no more compelling evidence of this than the NMDU's own prior insistence that The News did not employ its members. Such uncertainty leads to misunderstandings, litigation, and, in cases like this, the unfair assessment of retroactive liability.

Efficient administration of the Act and the establishment of predictable, stable, and harmonious collective bargaining relationships require adherence to the clear

rule set forth by this Court in *Columbian Enameling* and followed by the lower courts in such cases as *Alaska Roughnecks* and *Island Typographers*. This court should grant review in order to reaffirm that rule and to reverse the Third Circuit's erroneous departure from it.

2. *The decision below and this Court's decision in* Kelley *establish conflicting standards of employment.* In *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), this Court held that the proper legal standard for determining the existence of an employment relationship under the FELA was the common law test for "the master-servant relationship." *Id.* at 325. The Court expressly rejected the dissenters' suggestion that a generalized test, combining elements of the principal-agent and master-servant relationships, should be used. Instead, the Court endorsed the definition of "servant" set forth in the Restatement (Second) of Agency, *i.e.*, "a person employed to perform services in the affairs of another and who with respect to the *physical conduct* in the performance of the services is subject to the other's control or right to control." *Id.* at 324 (emphasis supplied). The Court stressed, furthermore, that "a finding of agency is not tantamount to a finding of a master-servant relationship." *Id.* at 325.

The Board in this case ignored *Kelley* and departed from its teaching. The Board did not distinguish between the relationship of principal-agent and that of master-servant. Instead, it confused and assimilated those two very different concepts, as when it stated that "[t]he relationship between [The News] and T & T exhibited strongly most of the factors commonly associated with agency or employee status." App. B at 30a. The Board's complaint had rested on the theory that T & T was The News' agent, and the Board's holding rested on its finding that "T & T was . . . the agent of [The News]." *Id.* Under *Kelley*, that plainly was an inadequate basis for treating The News as the statutory employer.

The court of appeals affirmed on the ground that, in its view, substantial evidence would support a finding that "T & T . . . was a servant of [The News]." App. A at 12a. By thus speaking in terms of a master-servant relationship, the court gave the appearance of following *Kelley*. In reality, the court was following the *Kelley* dissent. In finding T & T to be The News' servant, the Third Circuit, like the Board, was applying a generalized and vague "right to control" test that did not distinguish between the relationship of an agent to his principal and that of a servant to his master. The court satisfied itself with the observation that the Board had found "significant control," *id.*, a finding that does not distinguish between agency and employment.

In short, although the court paid lip service to *Kelley*, its approach is diametrically opposite to that taken by the majority in that case. This is vividly demonstrated by the outcomes of the two cases. In *Kelley*, this Court was unwilling to find that a corporation was the employer of its own subsidiary's employees. In contrast, the Third Circuit has held The News to be the employer of T & T's employees even in the absence of any common ownership or common corporate control.

No purpose is served by applying a different standard of employment under the NLRA than this Court applied under the FELA in *Kelley*. Those two federal statutes should be construed in harmony, with like terms being given like construction. *Cf. Lodge 1858, American Federation of Government Employees v. Webb*, 580 F.2d 496, 504-08 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978). Moreover, this Court already has affirmed that common law principles govern questions of employment under the NLRA. *See NLRB v. United Insurance Co.*, 390 U.S. 254, 256 (1968). The court below should have adopted and applied not just the master-servant terminology used in *Kelley* but also the underlying common law test that was given effect in that case. This

Court should grant review to clarify that the test is the same under both the FELA and the NLRA and that the test actually applied by the majority in *Kelley* governs here as well.

3. *The decision below violates a basic rule of administrative law.* Whether or not the Third Circuit applied the proper test of employment, it is clear that the Board did not do so. The Board regarded agency and employment as synonymous, and it held The News to be the employer of T & T's employees on the ground that T & T was The News' agent. The Third Circuit apparently recognized that the Board had erred at least in its articulation of the proper legal standard, for unlike the Board the court cited *Kelley* and used the master-servant terminology of that case. But instead of remanding for application of the proper legal standard, the court took upon itself the responsibility for determining the existence of a master-servant relationship. In doing so, the court of appeals stepped well outside the limits that this Court traditionally has placed upon the exercise of judicial power in reviewing administrative action. "[I]t was error to enforce without a remand to the Board for further examination of the evidence and proper fact-finding." *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 672 n.6 (1981).

For nearly a century now, this Court has "emphasized a simple but fundamental rule of administrative law." *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

> That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis.

Id. Where, as here, "an administrative agency has made an error of law, the duty of the [reviewing] Court is to

'correct the error of law committed by that body, and after doing so to remand the case to the [agency] so as to afford it the opportunity of examining the evidence and finding the facts as required by law.'" *NLRB v. Pipefitters*, 429 U.S. 507, 522 n.9 (1977) (quoting *ICC v. Clyde S.S. Co.*, 181 U.S. 29, 32-33 (1901)).

The lower court's departure from this settled rule was not mere harmless error. In determining that T & T was The News' agent, the Board did not find facts sufficient to establish that T & T also was The News' servant. "A servant is an agent . . . whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master." Restatement (Second) of Agency § 2(2). The Board's findings did not address the question of The News' right to control T & T's physical conduct in carrying out its contractual obligations.[6] Thus, it cannot be known whether the Board,

---

[6] The Board expressed the sum of its findings on this point in a single sentence:

> T & T [1] performed functions which were an essential part of the newspaper's operation, [2] had a long-term exclusive working arrangement with the newspaper, [3] carried the newspaper's product in trucks bearing the newspaper's name, [4] conducted its operation under daily guidance from newspaper personnel and subject to unilateral changes dictated by the newspaper, [5] had no proprietary interest in the work or the premises and equipment used to perform it, and [6] had no opportunity to take entrepreneurial risks.

App. B at 30a. Point [1] was held inadequate to establish an employment relationship in *Kelley*. *See* 419 U.S. at 325-26. Points [2] and [3] are irrelevant. *See, e.g., NLRB v. Associated Diamond Cabs*, 702 F.2d 912, 923 (11th Cir. 1983); *Hilton International v. NLRB*, 690 F.2d 318, 322 (2d Cir. 1982). Points [5] and [6] do little more than describe the cost-plus nature of the delivery contract between The News and T & T. Only point [4] goes to the question of control, and it appears to speak only to the kind of control normally exercised by a principal over its agent.

if it had applied the correct test, would have found that a master-servant relationship existed between The News and T & T.

In making that finding for the Board, the court of appeals committed a number of prejudicial mistakes. The court asserted, for example, that "[t]he costs of establishing T & T were paid for by The News," App. A at 13a, whereas the record demonstrates that T & T's owners established the business by making "the normal business investment" and that they additionally gave The News a bond to guarantee contractual performance. J.A. 422. The record also contradicts the court's suggestion that The News paid for T & T's operating expenses and "retained the right to demand that T & T discharge any driver, supervisor or assistant foreman who did not meet [The News'] approval." App. A at 13a.[7]

These factual errors stem from the court's failure to respect the proper division of labor between itself and the Board. A reviewing court has neither the expertise nor the procedures for making *de novo* findings of fact. Because it usurped the Board's function, the court of appeals committed factual mistakes going to the very heart of its decision on the merits. Thus, this case vividly illustrates the wisdom of this Court's "fundamental rule of administrative law" and the vital importance of requiring the lower courts to continue to adhere to it.

---

[7] T & T paid for its own accountants, bought its own stationery, and furnished, "at its own sole cost and expense, bill heads, ledgers and cashbooks and any other items to properly keep a bookkeeping system and all supplies needed in preparation of the daily wrappers." J. A. 422, 506, 1133. The News had the right to require T & T to remove drivers only if they were unsafe —a contractual provision that simply mirrored the right of the trucks' lessor to require The News to effectuate such removal. J. A. 1129-30.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD W. BECKLER *
KEITH A. JONES
DAVID M. FOSTER
STEPHEN M. MCNABB
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

* Counsel of Record

October 1985

Supreme Court, U.S.
FILED
OCT 15 1985
JOSEPH F. SPANIOL, JR.
CLERK

85-666

No. 85-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC.,
and THE HUDSON DISPATCH,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RICHARD W. BECKLER *
KEITH A. JONES
DAVID M. FOSTER
STEPHEN M. MCNABB
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

		Page
Appendix A	Opinion of the court of appeals dated July 8, 1985	1a
Appendix B	Decision and order of the National Labor Relations Board dated July 13, 1984	23a
Appendix C	Judgment of the court of appeals dated August 6, 1985	193a
Appendix D	Denial of petition for rehearing by court of appeals dated September 3, 1985	195a
Appendix E	Section 9(c)(1) of the National Labor Relations Act, *as amended*, 29 U.S.C. § 159(c)(1) (1982); 29 C.F.R. §§ 102.60-.61, .63 (1985)	197a
Appendix F	Letter from Newspaper and Mail Deliverers' Union of New York and Vicinity to the News dated May 5, 1980	205a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3438, 84-3620 and 84-3676

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC. and
THE HUDSON DISPATCH,
Petitioners, No. 84-3438

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

NEWARK TYPOGRAPHICAL UNION NO. 103,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Intervenor

(per Court's 12/5/84 order)

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC. and
THE HUDSON DISPATCH,
Respondents

vs.

NATIONAL LABOR RELATIONS BOARD,
Petitioner, No. 84-3620

NEWARK TYPOGRAPHICAL UNION NO. 103,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Intervenor

(per Court's 12/5/84 order)

NEWARK TYPOGRAPHICAL UNION NO. 103,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Petitioner, No. 84-3676

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC. and
THE HUDSON DISPATCH,
Intervenors

(per Court's 12/5/84 order)

Petition for Review
National Labor Relations Board

(Board Docket No. 22-CA-10386, et al.)

Argued

June 18, 1985

Before: ALDISERT, *Chief Judge*,
GIBBONS, *Circuit Judge*, and
DIAMOND, *District Judge*.*

(Filed July 8, 1985)

Frank C. Sabatino, Esquire
Schnader, Harrison, Segan and Lewis
1600 Market Street
Suite 3600
Philadelphia, Pennsylvania 19103

---

* Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Richard W. Beckler, Esquire
(ARGUED)
Carl W. Vogt, Esquire
David M. Foster, Esquire
Stephen M. McNabb, Esquire
Fulbright & Jaworski
1150 Connecticut Ave., N.W.
Washington, D.C.
Counsel for Petitioners in No. 84-2438

Rosemary M. Collyer
General Counsel
John E. Higgins, Jr.
Deputy General Counsel
Robert E. Allen
Associate General Counsel
Elliott Moore
Deputy Associate General Counsel
Elinor Hadley Stillman, Esquire
Jerrold Jay Wohlgemuth, Esquire
(ARGUED)
National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
Counsel for Petitioners in No. 84-3620

Sally M. Armstrong, Esquire
Brian A. Powers, Esquire
(ARGUED)
O'Donoghue and O'Donoghue
4748 Wisconsin Avenue, N.W.
Washington, D.C. 20016

Jack Wysoker, Esquire
Mandel, Wysoker, Sherman,
Glassner & Weingartner
71 Paterson Street
New Brunswick, New Jersey 08901
Counsel for Petitioners in No. 84-3676

OPINION OF THE COURT

ALDISERT, *Chief Judge.*

This review of a decision of the National Labor Relations Board requires us to examine contentions raised in separate petitions for review presented by an employer and a union, and the justification for the Board's action contained in the Board's application for an enforcement order. We must decide whether substantial evidence supports the Board's findings that (1) the News Printing Company, Inc. was the employer of the employees of T&T, Inc.; (2) economic reasons motivated the dismissal of eight editorial employees; (3) the Company did not fail to bargain in good faith with Local 103 of the International Typographical Union; and (4) the News Printing Company, Inc. reasonably filed a civil action against employees who had claimed workmen's compensation benefits. We hold that the Board's findings were supported by substantial evidence and therefore grant the application for enforcement of its order.

I.

The News Printing Company, Inc. and Hudson Dispatch are wholly owned subsidiaries of Allbritton Communications Company. The Board has previously found these entities to comprise a single employer (the Company). This finding is uncontested. There are two unions involved: the Newspaper and Mail Deliverers Union of New York and Vicinity (NMDU) and the Typographical Union No. 103, International Typographical Union, AFL-CIO (Local 103, ITU or the Union).

The events underlying this action occurred in 1980-81. Four distinct but related sets of facts give rise to the issues we must decide.

A.

The News contracted in 1966 with T&T, Inc. for T&T to handle The News's mailroom and delivery functions. Allbritton assumed this contract when it purchased The News in 1977. T&T employed workers represented by the NMDU to carry out the mailroom functions, which involved removing the printed newspapers from a conveyor belt in the mailroom, packaging the papers for delivery, placing advertising supplements in each bundle (topping) when necessary, loading the delivery trucks, and delivering the papers to retail stores and "drop" locations for distribution to deliverers. Peter Trombina, one of the owners of T&T, periodically negotiated and signed collective bargaining agreements between T&T and the NMDU. In October 1980, the Company and Trombina agreed that he would seek NMDU's approval of a Company proposal to consolidate delivery routes and reduce the size of T&T's work force. Under the terms of the proposal, the Company would pay any severance money owed T&T employees and would reimburse T&T for any legal fees incurred because of the proposal. The NMDU rejected the Company's proposal and the Company hired new employees to carry out the mailroom and delivery job functions of T&T. The Company denied Trombina and his employees access to The News's mailroom. The T&T employees have remained out of work since February 9, 1981.

B.

Since its purchase of The News and The Dispatch in 1977, Allbritton Communications Company had, by 1980, advanced over $2,500,000 to the News to compensate for operating losses. The News, however, still was not a profitable enterprise by July 1980. In August 1980, W. Dean Singleton, president of The News and The Dispatch, directed executive editor Richard Vezza to reduce the size of the editorial staffs of The Dispatch and The News through attrition. Vezza did not heed Singleton's direc-

tive and instead hired additional reporters in September and October. On October 24, 1980, Singleton learned the editorial staffs had not been reduced and ordered Vezza to cut the staff at The Dispatch from 44 to 40 employees and the staff at The News from 51 to 46. Eight editorial employees were then dismissed. Throughout this entire time period, and particularly in October 1980, Local 103 was attempting to unionize the editorial room employees.

C.

The composing room employees at The News were represented by Local 103. In December 1980, negotiations began between the Company and Local 103 for a new contract, because the then existing contract was due to expire on January 25, 1981. In November 1980, prior to formal negotiations, Singleton met with the president of Local 103 and informed him The News was in serious financial difficulty and would need to save approximately $35.00 per week for each composing room employee. The Company initially proposed a 15 percent wage cut ($51.00 per employee), an increase in straight-time working hours to a 40-hour work week, and a decrease in personal leave days from 10 to 5. The Union initially proposed an increase in overtime pay and an increase in paid holidays. The membership of Local 103 unanimously rejected the Company's proposal to decrease wages, and this rejection was communicated to the Company at one of the December bargaining sessions.

On January 14, the Company presented its "bottom line" position to the Union: a $35.00 per week cut for each composing room employee, taken in any combination of wages, fringe benefits, and personal days. On January 29, Singleton informed the Union that an agreement on cost reduction must be reached by February 10, and that he felt the negotiations were nearing impasse. On February 3, Singleton informed the vice president of the ITU that the Company was going to post its final offer

of a $35.00 per employee per week cost reduction on February 6 and would implement the reduction on February 10 if no agreement were reached.

On February 6, a bargaining session took place in the presence of a federal mediator. At this session Singleton proposed a three year contract, with a $35.00 cut the first year, a restoration of the cut the second year, and a $29.50 increase for the third year. The Union rejected the offer. On the same day, February 6, the Company posted a notice in the composing room stating that wages would be cut $35.00 per week effective February 10, and all other conditions would remain unchanged. The Union accepted the posted conditions on February 9, pending negotiation of a new agreement. However, the composing room employees did not return to work because that same night, February 9, the NMDU began picketing The News because of the Company's action in hiring replacement mailroom and driver employees and members of the Local 103 honored the picket line. On February 10 the Company notified the striking composing room employees that they would be permanently replaced if they did not return to work that afternoon. The employees did not return to work.

The members of Local 103 met on February 13 and voted to strike. Several meetings between the Company and Union took place during the pendency of the strike and the Company reverted to its original offer (15 percent wage cut, increase in straight time, decrease in personal days). A final bargaining session was held on November 17, 1981, without any further progress.

D.

While they were on strike, all but eight of the composing room employees filed workmen's compensation claims against The News alleging partial disabilities (51 employees filed claims). Most of the claimants filed their petitions on March 14, and each stated he or she had not

received medical treatment for the alleged disability. The Company filed answers to the petitions in August and September 1981. On November 25, the Company filed suit alleging fraud, conspiracy and abuse of process against each of the striking employees because of the mass workmen's compensation filings. On December 10, the Company amended its complaint, deleting as defendants the striking employees who had not filed workmen's compensation claims.

II.

In response to various charges made by the unions involved, the Regional Director of the NLRB filed an original and two amended complaints against the Company and T&T. Following a consolidated hearing before an Administrative Law Judge (ALJ), the ALJ issued a written opinion to which all parties filed exceptions. After a proceeding before the Board, the Board concluded, in disagreement with the ALJ, that T&T was not an independent contractor but rather an "administrative arm" of the Company and as such T&T's employees were also the Company's employees. Accordingly, the Board found that the actions of the Company in summarily replacing T&T's employees and "locking them out" violated § 8(a)(1), (3), and (5) of the Act, 29 U.S.C. § 158(a)(1), (3) and (5), and ordered reinstatement. The Company petitions for review of this portion of the Board's order. Although the Union's request to intervene in this aspect of the case was granted, the Union did not file an intervenor's brief.

The Board further determined, also in disagreement with the ALJ, that the Company did not violate § 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3), by discharging the editorial employees; the Company did not fail to bargain in good faith with Local 103 representing the composing room employees; and the Company did not violate § 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), by bringing an action against striking employees who had filed workmen's compensation claims. The

Union petitions for review of these findings. The Company has filed a brief as an intervenor.

Our review of the Board's factual findings is, of course, circumscribed. We must sustain the findings if they are supported by substantial evidence on the record considered as a whole. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). When, as here, the Board rejects certain findings made by an ALJ, this "substantial evidence" standard is cast in a special light.

> The Supreme Court has directed us to recognize that an ALJ's findings of fact constitute a vital part of the whole record that the court must review. These findings "are to be considered along with the consistency and inherent probability of testimony. The significance of his report . . . depends largely on the importance of credibility in the particular case." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496, 71 S.Ct. 456, 468, 95 L.Ed. 456 (1951). We must "recognize that evidence suppporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Id.*

Eastern Engineering & Elevator Co. v. NLRB, 637 F.2d 191, 197 (3d Cir. 1980).

Our review of the Board's application of legal precepts to the facts is plenary. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). The General Counsel has the burden of proving an unfair labor practice allegation by a preponderance of the evidence, *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 401 (1983), and if he fails to meet this burden the Board is required by § 10(c) to dismiss the allegation. The Board's determination that the General Counsel has failed to meet his burden must be upheld unless the determination has

no rational basis in the record. *Ladies Garment Workers v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972). We now address the several contentions advanced by the petitioners, the intervenors, and the Board.

III.

The Company argues that the Board's determination that The News employed the T&T employees is based on erroneous legal principles. We disagree. Initially, it is important to note that the Company does not contest the Board's determination that an employer violates § 8(a)(1), (3) and (5) of the Act, 29 U.S.C. § 158(a)(1), (3) and (5), if it engages in the type of conduct the Company did here. The dispositive, and contested issue is whether the Board properly found that the mailroom employees and drivers were employees of The News.

A.

Determination of independent contractor status as opposed to employee status involves an application of common law principles of agency. *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968). The law of agency looks to the degree of control the principal exerts over the details of the agent's performance. *NLRB v. Duie Pyle, Inc.*, 606 F.2d 379, 382 (3d Cir. 1979) (citing *NLRB v. Keystone Floors, Inc.*, 306 F.2d 560, 562 (3d Cir. 1962)).

This court has explained that the "right to control" test requires an examination of " 'the type of services rendered, the possibility of realizing additional profits through the exercise of entrepreneurial skill and the ownership and maintenance' of equipment." *Duie Pyle*, 606 F.2d at 382 (quoting *News-Journal Co. v. NLRB*, 447 F.2d 65, 68 (3d Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972)). In determining that the mailroom workers were employees of The News, the Board explicitly applied the right to control test:

> We have concluded that T&T was little more than an administrative arm of the Respondents; the Trombinas were managers employed by the Respondents to operate the delivery system to the Respondents' specifications. . . .
>
> The relationship between the Respondents and T & T exhibited strongly most of the factors commonly associated with agency of employee status. T & T performed functions which were an essential part of the newspaper's operation, had a long-term exclusive working arrangement with the newspaper, carried the newspaper's product in trucks bearing the newspaper's name, conducted its operation under daily guidance from newspaper personnel and subject to unilateral changes dictated by the newspaper, had no proprietary interest in the work or the premises and equipment used to perform it, and had no opportunity to take entrepreneurial risks. See *News-Journal Co. v. NLRB*, 447 F.2d 65 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972). Weighed against these factors and the Respondents' direct and indirect participation in labor relations matters, T & T's conduct of the lower-level functions of employee management and dealing with the Union was more akin to the role performed by supervisors than that characteristic of independent contractors.

App. at 1817.

The Company urges that the Board improperly equated agent status with employee status, arguing forcefully that a principal is not the employer of his agent's employees, relying on *Kelley v. Southern Pacific Co.*, 419 U.S. 318, 323 (1974). The Court in *Kelley* held that an employee of a trucking company (PMT) was not an employee of a railroad that contracted with PMT. The Court reasoned:

> The District Court found that PMT employees exercised supervision and control over the unloading op-

> erations, although the railroad bore the "responsibility" for those functions. On these facts, the District Court was plainly correct in concluding that PMT was an agent of the railroad. . . . [A] finding of agency is not tantamount to a finding of a master-servant relationship. See Restatement (Second) of Agency § 2. The finding that the railroad was "responsible" for the unloading operations is significantly weaker than would be a finding that it controlled or had the right to control the physical conduct of the PMT employees in the course of their unloading operations. The railroad would satisfy the District Court's "responsibility" test whenever it agreed to perform a service and subsequently engaged another company to perform that service for it on its premises. The "control or right to control" test, by contrast, would be met only if it were shown that the role of the second company was that of a conventional common-law servant.

Id. at 325-26.

The fatal flaw in the Company's contention is that here the Board did not find that the Company bore mere "responsibility" for the mailroom operations. Rather, the Board properly applied the "right to control test" and found that the Company exercised significant control over the conduct of T&T and its employees. The Company thus loses the *Kelley*-based major premise of its argument. The Board concluded that T&T was an "administrative arm" of The News, or, in the words of the *Kelley* Court "a conventional common-law servant." *Id.* at 326. Viewed as such, the mailroom employees were subservants of T&T which in turn was a servant of the Company, thereby rendering the Company the statutory employer of the NMDU workers. *See id.* at 324. This finding does not run afoul of the teachings of *Kelley* and it is supported by the following substantial evidence:

(1) The costs of establishing T&T were paid for by The News. App. at 922-30, 529.

(2) The Company provided T&T with its delivery trucks and paid for all of their operating expenses. The Company also provided free office space to T&T and provided all of the office equipment and telephone service. App. at 406-07, 726-30, 1127-33.

(3) The Company established the number of T&T employees to work each shift and retained the right to require T&T to hire additional employees, and also retained the right to demand that T&T discharge any driver, supervisor or assistant foreman who did not meet the Company's approval. App. at 411-13, 457-59, 528-29, 640, 1128-30, 1132-33.

(4) The Company established T&T's employees' work schedules and the routes and schedules for the drivers. T&T had no customers of its own. All orders from retail outlets came through the Company. App. at 407-10, 429, 457-58, 460-63, 465-68, 1127-33.

(5) The Company paid T&T a weekly amount that covered the employees' salaries and fringe benefits and all the operating expenses of T&T. The Company agreed that these weekly payments would be increased whenever required by the T&T-NMDU contract. App. at 475, 508-19, 526-27, 534-35, 544-46, 637-41, 734-36, 805, 856-57, 863, 1125-30, 1134, 1220-21.

(6) Before Trombina would negotiate a contract with NMDU on behalf of T&T, he would seek approval of The News. App. at 331-35, 388-99, 435-51, 519-22, 1088-1112, 1124, 1160-63.

(7) The Company handled T&T's employees' grievances regarding the mailroom and delivery trucks. App. at 365-66, 397-99, 560-64.

B.

The Company further argues that principles of collateral estoppel preclude the Board's finding that The News employed the mailroom workers and drivers. Following the Company's replacement of the NMDU workers, these workers began picketing The News's facilities. The Company filed suit in New Jersey state court, seeking to enjoin acts of alleged violence by the picketers. The NMDU removed the case to the United States District Court and filed a counterclaim under § 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. In adjudicating the counterclaim, District Judge H. Lee Sarokin determined, *inter alia*, that the T&T employees were not the employees of The News. Judge Sarokin then recused himself and the case was reassigned to Judge Herbert J. Stern. Judge Stern held that the case was improperly removed initially because the original action filed in state court did not "arise under" federal law, a threshold jurisdictional requirement for removal. *See* 28 U.S.C. § 1441(b).

The rule is well-settled that although removal proceedings are in the nature of process, and thus defects in the removal procedure are waivable, an absolute nonwaivable requirement is that federal subject matter jurisdiction to adjudicate the dispute exists:

> Longstanding decisions of this Court make clear . . . that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.

Grubbs v. General Electric Credit Corp., 405 U.S. 699, 702 (1971). Because Judge Stern determined that the federal district court would not have had original juris-

diction over the Company's suit for an injunction had the case originally been filed in United States District Court, any purported "findings" by Judge Sarokin should not be given collateral estoppel effect.

Moreover, additional reasons, quite apart from this basic jurisdictional defect, counsel against affording any collateral estoppel effect based on the earlier proceeding before Judge Sarokin. It is well settled that collateral estoppel applies only after a particular issue has been "necessarily determined by a court of competent jurisdiction . . . ." *Montana v. United States*, 440 U.S. 147, 153 (1979). We are persuaded that under the circumstances present here, the issue that the Company argues has already been determined—the employment status of T&T's employees—was not an issue that was necessary to the district court judgment. The only order entered below was Judge Stern's remand order. Clearly, the sole issue relevant to this judgment was the jurisdictional quastion: any "findings" by Judge Sarokin on the merits of the dispute were simply irrelevant. Accordingly, an essential predicate to the application of collateral estoppel did not exist.

C.

Finally, the Company contends that imposing liability on the Company based on an employer relationship with the mailroom workers violates due process. The Company reasons that since it has never been certified by the Board as the employer of the NMDU workers, the Board cannot now so find an employer-employee relationship. We find this argument unpersuasive.

When Allbritton purchased The News in 1977, The News asserted effective control over T&T and the mailroom employees, acting as their employer for purposes of the National Labor Relations Act. The News cannot now be heard to complain that the concomitant burden accompanying this employer-employee relationship—the

duty to negotiate and abide by the terms of the existing collective bargaining agreement—violates due process.

IV.

The Union argues that the Company's discharge of the editorial employees resulted from union animus and therefore was in violation of § 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3). The General Counsel bears the burden of proving that an employee's protected conduct was a "substantial or motivating factor" leading to his dismissal. *NLRB v. Transportation Management Corp.*, 462 U.S. at 401-02. However, if the General Counsel meets this burden, the "employer [may] avoid being adjudicated a violator by showing what his actions would have been regardless of his forbidden motivation." *Id.* Here, the Board concluded that the General Counsel failed to discharge the initial critical burden, and found that even if the burden had been met, the Company introduced sufficient evidence showing the dismissals resulted from a permissible motive. App. at 1822-23. The Board's finding that economic considerations were the motivating factor in the dismissals is supported by substantial evidence:

> (1) Prior to its purchase by Allbritton in 1977, The News had operating deficits and its composing room employees had been forced to grant "givebacks" to help the newspaper. App. at 737-41, 1616. Between 1974-76, the composing room employees agreed to forego two pay increases. App. at 184-85, 322-28.
>
> (2) Between 1977-1981, The News lost almost $2,000,000 and The Dispatch lost nearly $400,000. App. at 746-49, 1617-19.
>
> (3) In 1979, to reduce costs, the composing room operations of The News and The Dispatch were consolidated, allowing a reduction in work force from 125 to 50 employees. App. at 180-83, 310-21.

(4) In 1980, the Company ceased publishing The News's evening edition and laid off additional composing room and editorial employees. App. at 752, 822, 857.

(5) In July 1980, tentative plans were formed to close The News's operations completely. Singleton persuaded Allbritton to allow him one last chance to save the newspaper. App. at 751-52.

(6) In August 1980, Singleton directed executive editor Vezza to reduce the size of the editorial staffs at both newspapers to bring the staffs' sizes within industry guidelines. At this time, according to these guidelines, The News was overstaffed by five editorial employees and The Dispatch by four. App. 680-85, 717-18.

(7) Vezza did not abide by the directive from Singleton and did not allow the editorial staff to be reduced by attrition but rather hired additional employees. App. at 680-84, 707-09, 714-22, 752-53.

(8) On October 24, 1980, Singleton learned that Vezza had reduced the editorial staff by only one or two employees. Singleton ordered Vezza to cut the staffs immediately at The Dispatch from 44 to 40 and at The News from 51 to 46 employees. Singleton instructed Vezza to effectuate the dismissals that same day. App. at 683-84.

(9) Four employees at The Dispatch were laid off: Rubin, Neustadt, Goldensohn, and Ensslin. App. at 684-87. Neustadt and Goldensohn had worked at the newspaper for less than six months and Rubin was on probation for poor workmanship. App. at 85, 99, 105, 174.

(10) Four employees at The News were laid off: Vogel, Duhl, Fischer, and McDonnell. Vogel had worked at the paper for less than six months. App.

> at 114, 118, 706. Duhl, Fischer and McDonnell were chosen to be laid off based on personality, attitude toward the job, and interpersonal relationship factors. App. at 43-46, 64-65, 78-79, 212, 244, 250-51, 693-94, 696. Additionally, Fischer had poor workmanship. App. at 247-49, 690-91.

The above evidence supports the Board's finding that economic reasons underlay the dismissals. In arguing that the Board erred, the Union relies on evidence that the timing of the dismissals coincided roughly with the filing of a representation petition, that three of the discharged employees were union organizers and that several instances of anti-union statements made by supervisory personnel in the editorial room occurred. The Board did not ignore this evidence:

> [W]e find that the evidence of the Respondent's union animus and the suspicious coincidence between the Respondent's actions and the ITU's organization campaign do not establish that the latter was a motivating factor for the former. . . . The record taken as a whole gives us insufficient basis to choose the unlawful motive over the lawful one. . . .

App. at 1822. Our standard of review is thus dispositive. We may not "displace the Board's choice between two fairly conflicting views, even though the court could justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

V.

The Union argues that the totality of the circumstances demonstrates that the Company did not bargain in good faith with the composing room employees. We do not agree. The record contains substantial evidence supporting the Board's conclusion that the Company bargained in good faith.

Section 8(d) of the Act, 29 U.S.C. § 158(d), requires that parties bargain with "a real desire to come into agreement." *NLRB v. Insurance Agents' International Union*, 361 U.S. 447, 498 (1960). The statute does not compel "either party to agree to a proposal or require the making of a concession," *NLRB v. American Insurance Co.*, 343 U.S. 395, 404 (1951), nor may the Board "control[] the settling of the terms of collective bargaining agreements." *Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 470 (3d Cir. 1983) (citing *NLRB v. Insurance Agents' International Union*, 361 U.S. at 487).

The Union points to various events evidenced in the record and argues this evidence compels a finding of bad faith. The Union cites the hard line bargaining posture taken by the Company, statements by Singleton, president of The News and Dispatch, that if the employees did not accept a pay cut "they don't work here anymore," app. at 135, and "I don't give a damn about people anymore . . . any printer, driver or pressman who gets in my way, I'll roll right over him" *id.*, and the unlawful "locking out" of T&T and its employees. The Union also argues that no impasse had been reached and the Company's unilateral implementation of its final wage offer thus violated § 8(a)(5). Indeed, evidence exists in the record from which one could reasonably draw an inference of bad faith. That evidence, however, does not compel us to draw such an inference. "Although we . . . might have reached a different conclusion given the same facts, our power of review is not such that we may . . . reverse the decision of the Board as inadequately supported by the evidence." *International Telephone & Telegraph Co. v. NLRB*, 382 F.2d 366, 373 (3d Cir. 1967). Our inquiry turns, then, to whether substantial evidence exists to support the Board's finding of no bad faith. The record contains such evidence:

(1) The Company willingly participated in negotiations at the first session on December 2, 1980.

The News explained its financial condition and presented its first proposal. App. at 126-27, 186.

(2) At the second session The News offered to show the paper's financial records to the Union; the Union declined the offer. App. at 190, 211-12, 658-59, 776-77. At this session, The News also requested that a representative from the ITU participate. App. at 139-40, 201, 826. The Union did not think the presence of an ITU representative was necessary. App. at 660.

(3) The parties met on December 17. The News again stressed its dire financial problems. App. at 660-61.

(4) The parties met on January 14. The News presented its bottom line, upon request of the Union. The Union made no counterproposal. App. at 131-133, 662-66, 755-57.

(5) The parties met on January 29. This was five days after the News-Union contract had expired. App. at 133-34. No progress was made.

(6) The parties met on February 6 with a federal mediator present at The News's request. At this session The News offered a three-year—rather than one year—contract which set a pay cut in the first year, a restoration of the cut in the second year and a pay raise in the third year. The Union rejected the offer. App. at 138, 215-16, 667-68, 830. At this session Singleton determined the parties were deadlocked. He said he would post the conditions under which composing room employees would work until a new contract was signed. He said The News would continue to negotiate until a final agreement was reached. App. at 202, 205, 329, 830-31.

This record evidence supports a reasonable inference that the Company entertained "a real desire to come into

agreement." *NLRB v. Insurance Agents' International Union*, 361 U.S. at 498. Furthermore, it supports the Board's finding that the parties had reached an impasse after two months of negotiations on wage provisions. *See* app. at 1827. The Company, therefore, lawfully could implement the proposal that it had submitted to, and which was rejected by, the Union.

VI.

Finally, the Union argues that the suit alleging fraud and conspiracy filed against striking composing room employees was an attempt to interfere with their § 7 rights and therefore violated § 8(a)(1), 29 U.S.C. § 158(a)(1). We find no error in the Board's treatment of this issue.

It is not an unfair labor practice for an employer to bring an action against its employees if the lawsuit has a reasonable basis, "even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 743 (1982). The Board determined that the Company did not harbor an unlawful motive in filing the suit. This finding is supported by substantial evidence.

The workmen's compensation claims were filed en masse. *See* app. at 1250-1360. All but one of the claims alleged disability based on impurities in the air in the workplace. *Id.* (The single exception alleged disability based on exposure to "loud noises" in the work place). Each claimant acknowledged that he/she had not sought medical treatment for the alleged disability. *Id.* The Company filed answers to the claims and did not file suit until four months after the claims were filed. The Board did not err in finding that the Company reasonably could have perceived that the mass filing of claims was harrassment by the Union and constituted grounds for civil action.

VII.

The petitions for review will be denied and the application for enforcement of the Board's order will be granted.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

DZH

271 NLRB No.39

D—1671
Paterson and
Union City, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 22-CA-10386
22-CA-10645
22-CA-10647
22-CA-10682
22-CA-11014
22-CA-11045
22-CA-11307
22-CA-11338

ALLBRITTON COMMUNICATIONS, INC., and ITS WHOLLY OWNED SUBSIDIARIES, THE NEWS PRINTING COMPANY, INC. and THE HUDSON DISPATCH

and

NEWARK TYPOGRAPHICAL UNION NO. 103, INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO

and

Cases 22-CA-10639
22-CA-11212

NEWSPAPER and MAIL DELIVERERS UNION of NEW YORK and VICINITY

and

T & T NEWS COMPANY, INC.
Party in Interest

and

Case 22-CA-11313

STEVEN THOMPSON, an Individual

DECISION AND ORDER

On 24 September 1982 Administrative Law Judge James F. Morton issued the attached decision. The Respondents filed exceptions, a supporting brief, a motion to reopen the record, and a request for oral argument; the General Counsel filed exceptions, a supporting brief, an answering brief to the Respondents' exceptions, a motion to strike portions of the Respondents' brief in support of their exceptions, and an opposition to the Respondents' motion to reopen the record; Newspaper and Mail Deliverers Union of New York and Vicinity (NMDU) filed exceptions and a supporting brief; the Respondents filed an answering brief to the General Counsel's and NMDU's exceptions, cross-exceptions, and a supporting brief; and the General Counsel filed an answering brief to the Respondents' cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, briefs, and motions [1] and has decided to affirm the judge's rulings, findings,[2] and con-

---

[1] The Respondents have requested oral argument. This request is denied as the record, the exceptions, and the briefs adequately present the issues and the positions of the parties.

The Respondents' motion to reopen the record is denied as the proffered evidence either was excluded by the judge, has not been shown to be previously unavailable or newly discovered, or is irrelevant.

The General Counsel's motion to strike portions of the Respondents' brief in support of their exceptions is granted as the Respondents' brief recites facts which are not of record in this case. Accordingly, we strike from the Respondents' brief in support of its exceptions all references to facts not of record.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they

clusions only to the extent consistent with this Decision and Order.

We agree with the judge that the three Respondents, Allbritton Communications, Inc. (Allbritton) and its wholly owned subsidiaries, The News Printing Company, Inc. (News) and The Hudson Dispatch (Dispatch), constitute a single employer. We do not read the Respondents' exceptions and briefs as contesting the finding that News and Dispatch are a single employer, and the judge's finding in this regard is amply supported. News and Dispatch each publishes a daily newspaper bearing its name and, except for Dispatch's pressroom located 16 miles away, operates out of the same Paterson, New Jersey facility where the employees are governed by common supervision and labor relations policies. These labor relations policies are formulated and effectuated principally by W. Dean Singleton through his News and Dispatch subsidiaries. Singleton is the executive vice president of Allbritton, president of Allbritton's newspaper division, and president of both News and Dispatch. Singleton's duties as president of Allbritton's newspaper division also give him managerial responsibility for overseeing the operations of other newspapers published by the Allbritton chain. Singleton was instrumental in many of the labor relations activities on which the instant case resolves as discussed below. Joe L. Allbritton, owner, president, and chairman of the board of Allbritton, is also chairman of the board of News and Dispatch. On these facts as well as the reasons set forth by the judge all three Respondents clearly constitute a single enterprise or employer. We shall proceed with an analysis of the events occurring among the mailroom employees/drivers, the editorial employees, and the composing room employees.

---

are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Mailroom Employees/Drivers

The allegations regarding the Respondents' conduct with respect to these employees center around the employees' being expelled from and replaced in their jobs, an occurrence which coincided with the Respondents' repudiation of any bargaining relationship with the Union that represented them. The preliminary but crucial question is whether these were the Respondents' employees.

As set forth in more detail in the judge's decision the nominal employer of the mailroom employees/drivers (who take the News newspapers from the conveyor belt in the Respondents' Paterson facility, prepare them for delivery, and drive the delivery trucks) is T & T News Company, Inc. (T & T). T & T is owned and operated by the Trombina family under the active daily control of Peter Trombina, a former employee of the company that performed the delivery functions before T & T. T & T came into existence when the former management at News offered Peter Trombina and his father, a foreman with T & T's predecessor, the opportunity to form a company which would employ the former distributing company's employees and work exclusively for News to perform the same functions. T & T had little or no capital investment. It operated within the newspaper's facility using office space, equipment, materials, machinery, and trucks provided by the newspaper. The trucks displayed the newspaper's logo, not T & T's.

T & T began operating under contract with News in 1966. When Allbritton purchased News in 1977 it assumed the existing (1976-1982) contract under which T & T received a fixed weekly amount with which to pay the employees and its business expenses and retain a profit. The contract contemplated an increase in the weekly payment to reflect any increases in labor costs effectuated by collective-bargaining negotiations between T & T and the union representing its employees. That

Union at all relevant times has been the Newspaper and Mail Deliverers Union of New York and Vicinity (NMDU).[3]

T & T's 1976-1982 contract with News provided for the number of employees to be employed on each shift and gave News the right to require T & T to hire additional temporary employees. T & T's supervisors and assistant foremen had to be approved by News which had the right to order the discharge of any driver it considered unsafe and to approve that driver's replacement. T & T was to maintain the payroll, pay the employees, and secure workmen's compensation coverage for them. Route scheduling including the sequence of stops was News' responsibility. The daily starting times for the employees and the delivery times for each edition of the newspaper were set forth in the contract. Any changes in the routine were dictated to Trombina through daily conferences with News' circulation director.

The credited evidence establishes that, in negotiating for a new collective-bargaining agreement with NMDU in 1979, T & T's Peter Trobina, consistent with past practice, sought and obtained the approval of News before responding to the Union's demands. Trombina relayed the Respondents' positions to the Union and reviewed with the Respondents' representatives, including Singleton, a memorandum of understanding summarizing the terms of the tentative agreement reached. On receiving the Respondents' approval Trombina told the Union it could seek membership ratification and have the final contract printed. This was accomplished. Employee grievances pursued under the collective-bargaining agreements

---

[3] A separate provision of the T & T-News contract required T & T to have "a signed contract with the Driver's Union which will insure uninterrupted delivery service." In context with other provisions referring to the Union "which represents [T & T's] employees" there can be little doubt that the term "Driver's Union" acknowledges the status of NMDU as bargaining representative.

typically involved the condition of the mailroom or the trucks and, although taken up with T & T, could be resolved only by the action of the Respondents.

Based on these and other facts set forth in the judge's decision, the General Counsel has taken the position that T & T and the Respondents were joint employers of the mailroom employees/drivers or in the alternative that T & T (which has not been charged with any unfair labor practices) was the Respondents' agent in performing the functions of the employer of these employees.

The judge made a contingent finding that T & T and the Respondents were joint employers.[4] He regarded the

---

[4] This finding was contingent in the sense that the judge earlier had concluded that he was bound under the principle of collateral estoppel, by a U.S. district judge's finding that T & T and Respondent News were not joint employers. The administrative law judge's conclusion was erroneous, as the district court later determined that it improperly asserted removal jurisdiction. NMDU had initially obtained removal on the basis of a counterclaim asserted in a state court action instituted by Respondent News against it alleging picket line misconduct. As the district court lacked jurisdiction over the Union's cause of action which alleged the joint employer status, the court properly vacated the finding regarding that status and remanded the case to the state court. See *Billy Jack For Her, Inc. v. Ladies Garment Workers Local 1-35*, 511 F.Supp. 1180, 1184 (S.D. N.Y. 1981), and authorities cited.

We note also that in making the vacated findings the district judge relied on cases decided on principles applicable to the issue of "single employer" status rather than those applicable to "joint employer" issues. The district judge's failure to make this distinction may have been crucial. See *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117 (3d Cir. 1982), enfg. 259 NLRB 148 (1981). Finally, we decide the question of the Respondents' employer status as to these employees on grounds other than the standard "joint" *or* "single" employer analysis and therefore have no need to consider whether, if called upon to decide the same issue previously decided by the district judge, we should in the absence of collateral estoppel give any deference to his findings. For all these reasons we also leave for another day exploration of the

principal-agent theory as inapplicable and as adding nothing to the General Counsel's "joint employer" contention. We disagree. Joint employer status usually assumes that the business entities are independent and separate for other than labor relations purposes. *NLRB v. Browning-Ferris Industries*, supra. This also connotes, where the issue is whether one is acting for the other, that the actor is an independent contractor. The General Counsel's alternative contention, in which we find merit, is that, in performing the role of employer to the mailroom employees/drivers, T & T was not an independent contractor but the agent of the Respondents. Stated otherwise, we have concluded that T & T was little more than an administrative arm of the Respondents; the Trombinas were managers employed by the Respondents to operate the delivery system to the Respondents' specifications.

The "right to control" test used to determine whether a person is an independent contractor is the same whether independent contractor status is urged as alternative to

---

questions raised by the administrative law judge's conclusion that the Board may be precluded from deciding an issue previously decided in a private action brought under Sec. 301 of the Act. The general rule is that the Government, not having been a party to the prior litigation, is not barred from litigating an issue involving enforcement of Federal law which a private plaintiff has litigated unsuccessfully. *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56, 58 (5th Cir. 1979); Restatement 2d, *Judgment* § 41, Reporter's note at 402 (1982); 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction*, § 4458 at 520-521 (1981). The courts have given uncertain guidance as to whether that rule is eroded when a litigant in the earlier Federal court proceeding becomes a charging party before the Board. Compare *NLRB v. Heyman*, 541 F.2d 796, 800 (9th Cir. 1976) (Board precluded) with *Bay Area Sealers*, 251 NLRB 89, 102-111 (1980), enfd. 665 F.2d 970 (9th Cir. 1982) (with no mention of Board's rejection of collateral estoppel contentions), and *Newport News Shipbuilding*, 253 NLRB 721, 726-729 (1980), enfd. 663 F.2d 488 (4th Cir. 1981) (Board's primary jurisdiction unaffected by prior court determination).

employee status or to agent status. See, e.g., *Packing House & Industrial Services v. NLRB*, 590 F.2d 688, 698-99 (8th Cir. 1978), enfg. 231 NLRB 735 (1977). The relationship between the Respondents and T & T exhibited strongly most of the factors commonly associated with agency or employee status. T & T performed functions which were an essential part of the newspaper's operation, had a long-term exclusive working arrangement with the newspaper, carried the newspaper's product in trucks bearing the newspaper's name, conducted its operation under daily guidance from newspaper personnel and subject to unilateral changes dictated by the newspaper, had no proprietary interest in the work or the premises and equipment used to perform it, and had no opportunity to take entrepreneurial risks. See *News-Journal Co. v. NLRB*, 447 F.2d 65 (3d Cir. 1971), cert. denied 404 U.S. 1016 (1972). Weighed against these factors and the Respondents' direct and indirect participation in labor relations matters, T & T's conduct of the lower-level functions of employee management and dealing with the Union was more akin to the role performed by supervisors than that characteristic of independent contractors. *Better Building Supply Corp.*, 259 NLRB 469 (1981), enfd. mem. 707 F.2d 518 (9th Cir. 1983). We therefore find that the Respondents were at all pertinent times the employer within the meaning of the Act of the mailroom employees/drivers and were subject to all the duties and obligations accompanying that status.[5]

---

[5] The Respondents' actions in changing and eventually severing their relationship with T & T form the background and substance of the unfair labor practices alleged here and therefore cannot serve to insulate the Respondents from their employer-employee relationship.

Our rejection of T & T's independent contractor status makes it unnecessary to pass on the Respondents' status as a joint employer. Our finding does connote a "single employer." However T & T's agency status makes it unnecessary to analyze this issue in terms of commonality of ownership, management, and control of labor rela-

As described more fully by the judge, the Respondents set out to effect a major layoff of mailroom employees/drivers, first through the procedures provided in the collective-bargaining agreement it permitted T & T to negotiate with NMDU. When those procedures culminated in an arbitration award they deemed unsatisfactory, the Respondents repudiated the agreement and the Union's representative status and engineered a confrontation that gave them a pretext to lock the employees out.[6] The Respondents in effect discharged these employees in violation of Section 8(a)(3) and (1) for supporting NMDU in seeking the benefits of their collective-bargaining agreement. Further, acting as though they were strangers to the bargaining relationship nominally between T & T and NMDU, the Respondents repudiated their obligation to bargain with the Union. Therefore we agree with judge's contingent finding that the Respondents also violated Section 8(a)(5) as alleged with respect to the mailroom employees/drivers.

Editorial Employees

The judge found that the Respondents unlawfully threatened and laid off editorial employees to discourage them from seeking union representation. We find that

---

tions policies as in traditional "single employer" determinations. Rather than being held in common, these attributes of the employing enterprise all belong to the Respondents.

[6] The Respondents created the confrontation resulting in the lockout by surprising the employees as they arrived for work one evening with the presence of security personnel hired ostensibly to insert advertising supplements into the newspapers, thereby changing the existing mode of operation and eliminating a procedure called "topping" for which the employees had received extra pay. The Respondents did not consult the Union. When the employees, with no more than reasonable forcefulness, resisted this tactic, the Respondent expelled them from the premises and proceeded immediately with their well-prepared plan to have the guards take over all the mailroom duties including driving the delivery trucks.

certain unlawful threats have been established but that the alleged unlawfulness of the layoffs has not.[7]

For many years the composing room employees who worked for News and Dispatch were represented by Newark Typographical Union No. 103, International Typographical Union, AFL-CIO (ITU or Local 103). In 1980 some of the newspapers' unrepresented editorial employees began to organize their colleagues for representation by ITU. In September and October of that year, when the organizational efforts accelerated and became a topic of conversation among the reporters in the newsroom, the associated editor of News, an admitted supervisor, warned reporters to stop talking about "that sort of thing" and warned a composing room employee who was the chapel chairman for Local 103 that he should be more discrete in soliciting editorial employees to sign authorization cards. The editor punctuated the last warning by asking rhetorically what would happen when somebody lost his job. News' city editor, also a supervisor, told reporters that his superiors kept calling him to ask which employees should be discharged to block Local 103 and had instructed him to warn certain known union supporters they would be fired if necessary. We agree with the judge that these warnings and threats violated Section 8(a)(1).[8]

---

[7] The dissent correctly states that we have analyzed each of the three units separately. However, we have not ignored the relationship between the Respondents' actions affecting one unit and those affecting the others. To the contrary we have throughout this decision given careful consideration to all the facts in analyzing the Respondents' actions, lawful and unlawful.

[8] Chairman Dotson would not find the associate editor's conversation with the chapel chairman to be unlawful. The chapel chairman, who provided the only evidence of this conversation, described it as occurring in a "joking" atmosphere. Furthermore, the absence of evidence that the associate editor exhibited any hostility or antiunion attitude reinforces the friendly and casual context of this conversation.

Between 24 and 26 October 1980 the Respondents laid off eight editorial employees in what the judge found to be an action unlawfully motivated by a desire to discourage support for ITU. We find the judge's conclusion to be unwarranted. The two newspapers were suffering operating losses. Acknowledging this the judge nevertheless rejected the Respondents' showing that the layoffs were economically motivated. As the Respondents' witnesses testified, Allbritton's determination to make News and Dispatch self-sufficient caused Singleton in the summer of 1980 to instruct Executive Editor Vezza to trim the editorial staffs down to a level which conformed to industry guidelines. At first this was to be accomplished through attrition. Vezza apparently underestimated the urgency of this policy and hired some replacements for reporters who left. In October, Singleton decided that the reduction in force was not being accomplished and told Vezza to lay off 10 people to be selected by Vezza. Vezza delegated this selction to his managing editor. Of the 10 layoffs 2 were rescinded immediately and only 8 were alleged as discriminatory.

The judge's reasons for rejecting this explanation involve both the overall economic justification and the results of the selection process. In his analysis he intruded more than slightly into an area of managerial authority reserved to the Respondents and not intended to be subject to second-guessing by the Board. See *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255, 1265 (7th Cir. 1980). The judge did not purport to deny that a layoff was economically justified.[9] In fact he acknowl-

[9] The dissent's characterization of this statement as "incorrect" confuses the judge's ultimate conclusion—that the economic justification was pretextual—with his acknowledgement that the Respondents' News and Dispatch both were suffering operating losses. The judge also states "that the economic facts . . . support strongly Respondent's demand for givebacks" in the composing room unit. The last statement is based on the judge's finding that in the fall of 1980 the Respondents were "continuing to experience financial losses," clearly a justification for cost-cutting measures.

edged that postlayoff hiring was principally to replace employees who left after the layoffs. Thus the newspapers continued functioning for several months at the staff level established by the layoff.[10] While giving too little weight to that significant economic fact the judge placed far too much emphasis on an artificial issue concerning the details of the Respondents' final approval of the newspapers' budget for the fiscal year beginning October 1980. Newspaper officials had proposed a budget which continued existing staffing levels. However Singleton testified that he took no final action on the budget until the decision was reached to reduce it by laying off the excess editorial employees, and nothing was presented which contradicts that testimony.[11] It is not our function to judge the reasonableness of this decision or of the Respondents' failure to reach a decision earlier. Moreover the evidence suggesting to the judge that selection of the employees for layoff was discriminatory is unconvincing. There is no evidence that more than three of the eight alleged discriminatees were known to the Respondents as active union supporters or that most of

---

[10] Three months after the layoffs the Respondents had yet to fill a vacancy occurring in the middle of that period. After that, the Respondent began gradually to increase the staff to prelayoff levels. The first new hire in excess of postlayoff vacancies was made nearly 4 months after the layoff. The nine new hires within 5 months resulted in a net increase of only four.

[11] The dissent's restatement of the credited testimony regarding the sequence of events leading to Singleton's rejection of the budget is somewhat misleading. Executive Editor Vezza testified that Singleton instructed him in the summer of 1980 to reduce the editorial staff by attrition if possible. Vezza hired five replacements over the next few months in spite of these instructions. There is no indication that the fact that employees were replaced was reflected in the proposed budgt Vezza submitted to Singleton. Vezza testified that he did not know whether Singleton was aware of it and there is no other eivdence regarding Singleton's knowledge. Thus the dissent's statement that the replacements were hired "under the budget" signifies little if anything.

them were known as union supporters at all. The judge found the reasons assigned for some of the selections to be unsatisfactory, but there is no proof either that the Respondents deviated from past practice in their criteria for layoff or that they retained employees who were inferior to those selected for layoff under their announced criteria.

For these reasons we find that the evidence of the Respondents' union animus and the suspicious coincidence between the Respondents' actions and the ITU's organizational campaign do not establish that the latter was a motivating factor for the former. See *Mini-Industries*, 255 NLRB 995 fn. 2 (1981). The record taken as a whole gives us insufficient basis to choose the unlawful motive over the lawful one. Id. at 1006.[12] And even assuming the General Counsel had proved a prima facie case we find that the Respondents' economic explanation

---

[12] In addition the the unlawful threats we have found above, the judge relied on a statement attributed to Singleton which was not alleged as a violation but which the judge found relevant to the question of union animus. The judge found that Singleton had told a supervisor that the Respondents would punish ITU for trying to organize the editorial employees and would not give the composing room employees whom ITU already represented a raise. This finding was based on an employee's testimony that the supervisor had told the employee Singleton had made such a statement. The Respondents objected to the admission of the employee's testimony as "double hearsay." The judge admitted it as an admission against interest which is not hearsay even if offered by way of a nonwitness third person's quotation. Singleton denied making such a statement and the supervisor did not testify. The judge credited the employee and discredited Singleton's denial.

We do not accept the employee's testimony in these circumstances to prove the truthfulness of the supervisor's alleged admission that he heard the statement from Singleton. While the employee's testimony would have been admissible for the purpose of proving a threat conveyed by the supervisor, we are unwilling to find that it was properly admitted to prove the fact that Singleton made the statement to the supervisor. In any event we would not credit it for that purpose in light of Singleton's in-court denial.

was sufficient to rebut it and was not shown to be pretextual. Cf. *Ja-Wex Sportswear*, 260 NLRB 1229, 1234-35 (1982). We therefore reverse the judge's finding regarding the October 1980 layoffs and dismiss the corresponding allegations of the complaint.

We agree with the judge that the Respondents unlawfully discharged editorial employee Dale Rim in February 1981 for refusal to perform the work of the striking composing room employees. Rim's supervisor had assured him that he would not have to do struck work if he crossed their picket line. There is no support for the Respondents' contention that the judge erred in finding that the work involved was struck work. The Respondents made no effort to show that Rim's refusal to perform struck work eliminated the need for his editorial services, nor did they treat him as a striker. Rim's discharge unjustifiably interfered with his right to engage in the protected concerted activity of supporting the strike of his fellow employees and thus violated Section 8(a)(1). *General Tire & Rubber Co.*, 190 NLRB 227 (1971), enfd. 451 F.2d 257 (1st Cir. 1971). As Rim's activity was also in support of the action of Local 103 in calling the strike of the composing room employees and especially as Local 103 had been attempting to organize the editorial employees, the judge was correct in finding that Rim's discharge also violated Section 8(a)(3).

Having found that the extent of the Respondents' unfair labor practices in the editorial employees' union consisted of some warnings and threats of discharge in September and October and an indirectly related discharge several months later, we decline to adopt the judge's recommended bargaining order. The judge based his recommendation largely on his finding that the Respondents had perpetrated a discriminatory layoff just as ITU had obtained a majority of authorization cards. We have rejected his finding that the layoff was unlawful. As we also reverse, infra, his findings with regard

to much of the alleged unlawful conduct affecting the composing room employees, we need not pass on the "fallout" effect within the editorial unit that the judge attributed to such conduct. We are left with the earlier threats which apparently did not hinder ITU from obtaining a card majority, the discharge of Rim which was remote both in time and focus, the lockout of the mailroom employees/drivers which would not necessarily have portended anything for the editorial employees, and only isolated other conduct which arguably impinged on ITU's organizing of the editorial employees but which was not alleged as unlawful. It would be presumptuous for us to hold that this conduct makes the possibility of holding a fair election in the editorial unit so unlikely as to warrant a bargaining order.

The Composing Room Employees

A. *8(a)(5) Allegations*

The primary issue concerning the composing room employees is whether the Respondents' collective-bargaining negotiations with ITU were conducted in bad faith. The judge found that the Respondents' overall bargaining strategy, evidenced by their conduct throughout the yearlong negotiations, was an intent not to engage in genuine bargaining. We find otherwise.

The Respondents met with ITU at reasonable times and places and even urged the presence of ITU's International representative to facilitate bargaining and soliciting the aid of a Federal mediator. The Respondents offered proposals and counterproposals, offered to substantiate the claim of operating losses that underlay its demand for wage reductions, and otherwise met its procedural obligations. The judge did not find that the Respondents' substantive proposals were so harsh, vindictive, or otherwise unreasonable as to warrant the conclusion that they were offered in bad faith. See *Chevron Chemical Co.*, 261

NLRB 44, 46 (1982).[13] Rather, the judge concluded that the Respondents' bargaining approach was improperly influenced by its dispute with NMDU concerning the mailroom employees/drivers. While he does not spell out precisely the presumed connection between the Respondents' bargaining tactics with ITU and the lockout of the mailroom employees, the judge asserts that the two are "very much bound up" with another. Thus he appears to suggest either that (1) the Respondents had determined to extract a wage concession from the composing room employees in order to finance the expenses of replacing the locked-out mailroom employees with guards or that (2) the Respondents provoked ITU into a strike to cause the mailroom employees to honor its picket line and stay out after the lockout. However this imputation to the Respondents of something akin to a secondary boycott—use of its ITU negotiations to achieve its objectives elsewhere—is speculative to the extent it is not irrelevant. It is irrelevant to the extent that it would have the Board examine why an employer wants to save on labor costs; it is speculative to the extent that it attributes to the respondents an almost clairvoyant ability to foretell a tangled sequence of events that did in fact culminate in the mailroom employees' refusing to cross an ITU picket line.[14]

Without the aid of this underlying thesis, the judge's conclusion of overall bad faith rests on statements by management negotiators indicating the toughness of the

---

[13] Chairman Dotson would not in any event attempt to evaluate the reasonableness of a party's bargaining proposals. *Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 470 (3d Cir. 1983).

[14] Shortly after the lockout the Respondents complied with a Federal court's temporary restraining order requiring them to allow the mailroom employees back to work. It was then that they honored the ITU picket line.

Respondents' bargaining stance.[15] Some statements by negotiating parties may indeed betray an intention to refuse to bargain in good faith. But the Board must be especially wary of throwing back in a party's face non-substantive remarks he makes in the give-and-take atmosphere of collective bargaining. To lend too close an ear to the bluster and banter of negotiations would frustrate the Act's strong policy of fostering free and open communications between the parties. See *Carpenter Sprinkler Corp.*, 238 NLRB 974, 975 (1978), enfd. in relevant part 605 F.2d 60 (2d Cir. 1979). Here none of the statements made at negotiating meetings went so far as to belie the hard but real bargaining that accompanied them. Cf. *Preterm, Inc.*, 240 NLRB 654, 655 (1979). As for other statements noted by the judge which were made outside of negotiating meetings, they were in isolated instances improvident, but nothing said or done casts more than a suspicion on what otherwise was straightforward bargaining.[16]

We find unlawful other conduct of the Respondents, discussed elsewhere in this decision. Crucial to our determination of overall good or bad faith however are the

---

[15] The judge inadvertently changed the sense of one of the statements which he used to support his bad-faith finding. Singleton was quoted in the record as saying, to emphasize his determination to get wage concessions, that "any printer, driver, or pressman who gets in my way, I'll roll right over him." The judge recast this into a threat to "roll right over Local 103 if it did not accede to his demands." Such a threat, itself of very limited probative value, is much more specific than the one actually uttered. We note among other things that Local 103 (ITU) represented neither the drivers nor the pressmen.

[16] Among the statements away from the bargaining table on which the judge relied was the quotation attributed to Singleton about punishing ITU for attempting to organize the editorial employees. As discussed at fn. 12, supra, we do not accept the finding that Singleton said that. The judge noted that the layoff of editorial employees underscored the statement, but we have found that the layoff was a lawful act.

events of October 1980 to the first 2 weeks of February 1981. The events after ITU's 13 February strike (described in the judge's decision and discussed to some extent below) neither form the core of the bad-faith contentions nor shed much light on the Respondents' overall bargaining design. Our analysis of the events of that crucial period leads us to conclude that the General Counsel has failed to prove that the Respondents bargained in bad faith.

The General Counsel urges as an additional or alternative violation that the Respondents unilaterally effectuated its demanded $35-per-week reduction without barbaining to impasse with ITU. We find no violation because the Respondents had bargained in good faith for 2 months for a wage concession and had presented $35 as its "bottom line" proposal at least 3 weeks before its implementation.[17] As there had been no progress on this, the central issue dividing the parties, and as ITU had given no indication that it would agree to *any* wage concession, there was an impasse and the Respondents were justified in implementing the proposal it had submitted and ITU had rejected. *E. I. Dupont DeNemours & Co.*, 268 NLRB No. 161 (Feb. 24, 1984). See also *Associated Grocers*, 253 NLRB 31, 56 (1980).[18]

---

[17] Three months before implementation Singleton had informed Local 103's president in an informal prenegotiating meeting that the Respondents needed a wage concession equivalent to $35 per week per employee.

[18] The judge had determined that, consistent with his view that there was overall bad-faith bargaining, he should not consider the unilateral change allegation separately. Because the 6 February 1981 notice to employees essentially implemented the unilateral change and was incidental to it, we cannot agree with the our dissenting colleagues that its posting constituted an independent 8(a)(1) violation. To the extent that the notice required employees to signify acceptance of the lower wage rates it was a necessary precaution against claims for the preexisting rates.

Although we find that the Respondents' bargaining tactics were otherwise lawful, we adopt the judge's finding that the Respondents violated Section 8(a)(5) and (1) by refusing to negotiate with ITU's bargaining committee with an official of NMDU present. The Respondents did not establish any justification for disbelieving ITU's representation that the NMDU official was there merely as a temporary addition to ITU's bargaining committee. Nor did they otherwise meet the burden of a party who objects to the representatives selected by the other party. The Respondents simply refused to meet with the ITU bargaining committee as then constituted. The Board and the courts have long held that this is not permissible. *General Electric Co.*, 173 NLRB 253 (1968), enfd. in relevant part 412 F.2d 512 (2d Cir. 1969); *Proctor & Gamble Mfg. Co. v. NLRB*, 658 F.2d 968, 976-977 (4th Cir. 1981).

B. *Status of Strikers*

At a meeting of composing room employees on 13 February 1981 ITU's representatives described the Respondents' bargaining conduct and held a strike vote. A strike ensued. The judge found that the employees were protesting the Respondents' bad-faith bargaining and therefore found them to be unfair labor practice strikers. As we have found that the Respondents' bargaining conduct was lawful up to that point, we reverse that finding. Moreover, as there is no evidence that the Respondents' refusal to meet in the presence of NMDU officials or any other unlawful conduct prolonged the strike, we find that the striking employees remained economic strikers until they unconditionally applied to return to work on 25 June 1981. We agree with the judge that their offer was unconditional, that the Respondents had no valid basis for their asserted doubt that the offer was unconditional, and that the Respondents' refusal to treat the offer as unconditional and to accord the strikers the rights to which

their offer entitled them violated Section 8(a)(3) and (1).[19] Therefore on 25 June 1981 they ceased to be economic strikers and became discriminatees whose rights are governed by *Laidlaw Corp.*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970).

C. *Other 8(a)(1) and (3) Allegations*

The judge dismissed the General Counsel's allegation that the Respondents unlawfully coerced composing room employees by "displaying" guards hired to replace locked-out or striking employees. It is alleged that this conduct demonstrated to the composing room employees the futility of bargaining. We do not adopt the judge's theory that this conduct was lawful because the Respondents lawfully replaced the mailroom employees with these guards. See our finding to the contrary, above. However, assuming the unlawfulness of the lockout there is simply insufficient evidence that the presence of potential replacements had the requisite tendency to chill the protected activity of the composing room employees. We therefore dismiss this allegation.

We adopt the judge's finding that Singleton violated Section 8(a)(1) by threatening to break off negotiations with ITU if the composing room employees honored the NMDU's picket line. Nevertheless, for the reasons stated in connection with the bad-faith bargaining allegation, we cannot adopt his finding that Singleton's bargaining-meeting remark that, unless ITU acceded to his bargaining demands, the composing room employees "don't work here anymore" was unlawful.

---

[19] ITU offered on behalf of the strikers to return to work under any conditions prescribed by the Respondents. Having done so, they did not also have to waive the right to collective bargaining over the wage provisions of a new contract which, the record shows, was the interpretation the Respondents sought to put on "unconditional offer."

The judge found that the Respondents unlawfully resisted arbitration of a contract dispute over pay for unused vacation and personal days. He concluded that the Respondents' claim, in asserting that the matter was one to be resolved through bargaining rather than arbitration, was discriminatory because the Respondents were simultaneously failing to bargain in good faith. He also concluded that delay of the grievance-arbitration proceeding was in derogation of the Respondents' duty to bargain. We find the judge's 8(a)(3) theory inapposite because we disagree with his underlying finding that the Respondents were bargaining in bad faith. But regardless of this we find nothing improper about the Respondents' assertion of their legal position regarding their contractual obligation and the arbitrability of the dispute. The Respondents ultimately did go to arbitration. Granted that the issue of arbitration is ordinarily to be raised before the arbitrator, we have not been shown that the Respondents' initial resistance was groundless.[20] We therefore do not find that their motive was unlawful.

Were this a case involving prearbitration deference to the grievance-arbitration procedure we would not hesitate to defer. *Roy Robinson Chevrolet*, 228 NLRB 828 (1977). See also *United Technologies Corp.*, 268 NLRB No. 83 (Jan. 19, 1984). Of course, if the Respondents were continuing to assert that the claims were not arbitrable we would be faced with the issue of whether such conduct constituted a repudiation of the bargaining obligation. Cf. *Community Convalescent Hospital*, 206 NLRB 962 (1973). But as the matter stands, the conduct complained of reduces to a skirmish over contractual rights and the proper forum for their resolution. These questions presumably have been resolved by the arbitrator

---

[20] Although the contract had expired before the claimed benefits accrued, the Respondents did not assert expiration as a defense to the claim. The Respondents did assert that the claim for personal days was premature under the contract terms, thus reaffirming their intention to adhere to the contract.

and his award or other disposition has not been challenged before us as wanting under *Spielberg* [21] standards. There remains no substantial issue of employee rights under the Act.

The penultimate unfair labor practice allegation for our consideration involves a conspiracy suit filed in state court by Respondent News against 51 striking composing room employees who had filed identical workmen's compensation claims against News.[22] News erroneously included as defendants in its original complaint some strikers who had not filed claims against it but promptly amended its complaint to drop them as defendants. The General Counsel alleged and the judge found that News filed this suit to discourage the employees from pursuing their workmen's compensation claims and thereby interfered with their Section 7 rights. We disagree. Whether or not a Section 7 right was involved—a question we need not reach—News' legal action was on its face a response to a perceived harassment by the strikers. That response does not appear to us so unreasonable as to warrant the inference that the suit had an ulterior motivation such as to discourage employees from filing legitimate claims or to penalize them for doing so. *Power Systems*, 239 NLRB 445, 449-450 (1978).[23] Therefore we reverse the judge's finding and dismiss the allegations.[24]

---

[21] *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955). See *Olin Corp.*, 268 NLRB No. 86 (Jan. 19, 1984).

[22] The strikers' claims were all filed on the same day and each conceded that the claimant had received no medical treatment for the alleged disability.

[23] As the lawsuit now appears to have been dismissed in its entirety, we are not restricted under *Bill Johnson's Restaurant v. NLRB*, 103 S.Ct. 2161 (1983), from applying appropriate remedies for its misuse. However, we find no improper motivation.

[24] The General Counsel contends that the lawsuit also violated Sec. 8(a)(3). For the reasons stated above, we find no merit in that contention.

Finally we adopt the judge's finding that Supervisor Brocklesby's statement to composing room employee Thompson, that if Thompson circulated and filed a successful decertification petition to get rid of ITU the employees could receive benefits, violated Section 8(a)(1).[25]

Conclusions of Law

1. Respondent News, Respondent Dispatch, and Respondent Allbritton are each an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Respondent News, Respondent Dispatch, and Respondent Allbritton constitute a single employer within the meaning of the Act and all three are liable for the unfair labor practices found in this case.

3. Local 103 and NMDU are each a labor organization as defined in Section 2(5) of the Act.

4. The Respondents are the employer of the mailroom employees/drivers represented by NMDU.

5. All employees of the Respondents performing the following operations: driving of trucks; loading of trucks; making foot deliveries to dealers, agents, and carriers; making truck deliveries; tying and bundling papers; wrapping mail; shuffling papers; related operations; and manning of return room, if any, at the Paterson plant, excluding all other employees, guards and supervisors, constitute a unit appropriate for purposes of collective bargaining within the meaning of the Act.

---

[25] Chairman Dotson would not find a violation. The conversation was initiated by Thompson, who raised the question of whether he was covered by the already expired ITU contract. Brocklesby, Thompson's immediate supervisor, improvised a response which was not only totally unauthorized but was plainly unpremeditated. Significantly there was no followup on Brocklesby's recommendation or any indication that it was other than the casual remark that its circumstances suggest.

6. By unilaterally changing the assignment of work and the method and procedure by which newspapers were "topped" by their mailroom employees/drivers without notice to or bargaining with the NMDU; by locking out and replacing the mailroom employees/drivers because they were members of, or gave assistance or support to, NMDU; and by failing and refusing to bargain collectively with NMDU as the exclusive representative of their mailroom employees/drivers, the Respondents violated Section 8(a)(1), (3), and (5) of the Act.

7. By the warnings given by Laciura, by the threats of discharge by Laura, and by the promises made by Brocklesby to induce an employee to act to decertify Local 103, the Respondents interfered with, restrained, and coerced, and are interfering with, restraining, and coercing, their employees as to their rights under Section 7 of the Act and thereby have violated Section 8(a)(1) of the Act.

8. The Respondents discharged employee Dale Rim because he refused to perform work normally done by Local 103 members on strike and the Respondents thereby interfered with, restrained, and coerced him with respect to his right under Section 7 of the Act to refuse to perform such work and the Respondents thus violated Section 8(a)(1) of the Act, and because the Respondents' action also discouraged membership in and support of Local 103, they thereby violated Section 8(a)(3) of the Act.

9. The Respondents did not, by their discharge of Charles Macaluso, violate Section 8(a)(1), (3), (4), or (5) of the Act.

10. The Respondents did not, by displaying strike replacements to its employees, violate Section 8(a)(1) of the Act.

11. From 13 February 1981 to 25 June 1981 the composing room employees employed by the Respondents were engaged in an economic strike.

12. Local 103 has on and since 25 June 1981 unconditionally requested the Respondents to reinstate to employment the striking composing room employees and, by the Respondents' failure and refusal since 25 June 1981 to honor those requests, they have discriminated against those employees in order to discourage them from continuing to support Local 103 and thereby have violated Section 8(a)(3) and (1) of the Act.

13. The Respondents did not violate Section 8(a)(3), (5), or (1) of the Act by laying off eight editorial employees.

14. The Respondents did not violate Section 8(a)(3) and (5) of the Act by failing and refusing to honor Local 103's claims for vacation pay and wages for personal days allegedly due the composing room employees or by delaying the processing of Local 103's grievances as to such claims.

15. By threatening to refuse to continue bargaining if the composing room employees honored the NMDU picket line, the Respondents violated Section 8(a)(1) of the Act.

16. The Respondents did not violate Section 8(a)(1) by Singleton's statement that composing room employees would not work there anymore unless Local 103 acceded to his bargaining demands.

17. The Respondents did not violate Section 8(a)(3) or (5) by instituting and prosecuting a civil action against its composing room employees.

18. All composing room employees, including data processing and technical service employees employed by Respondents at their Paterson, New Jersey, plant, but excluding all other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining under the Act.

19. By failing and refusing to bargain collectively with individuals designated by Local 103, the exclusive

representative of the composing room employees, as members of its bargaining committee, the Respondents violated Section 8(a)(5) and (1) of the Act.

20. The Respondents have not otherwise violated Section 8(a)(5) by failing or refusing to bargain collectively with Local 103 as the exclusive representative of the Respondents' composing room employees.

21. The unfair labor practices above, whereby the Respondents have been found to have violated Section 8(a)(1), (3), and (5) of the Act, affect commerce within the meaning of Section 2(6) and (7) of the Act.

Amended Remedy

Having found that the Respondents have engaged in unfair labor practices respecting the mailroom employees/drivers, we shall order them to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

Specifically, we shall order that the Respondents reinstate the method and procedure by which newspapers were "topped" prior to their unilateral change on 9 February 1981, that they recognize and bargain collectively with NMDU as the exclusive bargaining representative of the mailroom employees/drivers, and that they offer the locked-out mailroom employees/drivers immediate and full reinstatement to the jobs they held immediately before 9 February 1981 or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any replacements hired in their places, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them, with interest as provided in the section of the judge's decision entitled "Remedy."[26]

---

[26] We recognize that for some period of time the locked-out employees remained out of work while honoring a picket line of composing room employees. The Respondents' reinstatement obliga-

Having found that the Respondents unlawfully rejected the striking composing room employees' unconditional offer to return to work 25 June 1981, we shall order that all striking composing room employees who were not permanently replaced before that date be reinstated to their former jobs or, if such positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights or privileges previously enjoyed, discharging, if necessary, any replacements hired after 25 June 1981, and that they make whole such employees for any loss of earnings resulting from their failure to reinstate them with interest thereon to be computed in accordance with the judge's "Remedy."[27] Such employees for whom no employment is immediately available shall be placed on a preferential hiring list for employment as positions become available and before other persons are hired for such work. Priority for replacement on such list is to be determined by seniority or some other nondiscriminatory test.[28]

We shall also order that the notice to employees be mailed to each striker as provided in the judge's "Remedy," and likewise to the locked-out employees.

As the unfair labor practices we have found do not warrant a broad cease-and-desist order, we shall substitute a narrow order.

In all other respects we adopt the judge's "Remedy" where applicable to the unfair labor practice findings we have adopted.

---

tion and backpay liability may be limited, however. In the compliance stages of this proceeding, the parties may litigate the question of responsibility for the employees' absent from work.

[27] As the Respondents rejected the strikers' unconditional offer to return to work, the 5-day grace period following their offer is inapplicable. *Whisper Soft Mills*, 267 NLRB No. 133, slip op. at 17 (Aug. 26, 1983).

[28] Ibid.

ORDER

The National Labor Relations Board orders that the Respondent, Allbritton Communications, Inc., and its wholly owned subsidiaries, The News Printing Company, Inc. and the Hudson Dispatch, Paterson and Union City, New Jersey, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally changing the assignment of work and the method and procedure by which newspapers are "topped" by the mailroom employees/drivers without notice to or bargaining with the Newspaper and Mail Deliverers Union of New York and Vicinity (NMDU).

(b) Locking out and replacing the mailroom employees/drivers because they are members of, or give assistance or support to, NMDU.

(c) Warning employees against discussing, or signing authorization cards for, Newark Typographical Union No. 103, International Typographical Union, AFL-CIO (Local 103).

(d) Threatening to discharge employees if they support Local 103.

(e) Threatening to refuse to bargain with Local 103 to discourage employees from honoring a lawful picket line.

(f) Promising benefits to encourage employees to solicit other employees in order to have Local 103 removed as bargaining agents of the Respondents' composing room employees.

(g) Discharging employees because they support Local 103 by having refused to perform work normally done by striking composing room employees.

(h) Refusing to accept strikers' unconditional offer to return to work.

(i) Failing and refusing to bargain collectively with NMDU as the exclusive representative of the unit of employees described as follows:

> All employees of the Respondents performing the following operations: driving of trucks; loading of trucks; making foot deliveries to dealers, agents, and carriers; making truck deliveries; tying and bundling papers; wrapping mail; shuffling papers; related operations; and manning of return room, if any, at the Paterson plant; excluding all other employees, guards and supervisors as defined in the Act.

(j) Failing and refusing to deal with individuals designated by Local 103 as its agents for purposes of collective bargaining for the employees in the unit of employees described as follows:

> All composing room employees, including data processing and technical service employees employed by Respondent at its Paterson, New Jersey plant, but excluding all other employees, guards and supervisors as defined in the Act.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Reinstate the method and procedure by which newspapers were "topped" prior to its unilateral change on 9 February 1981.

(b) Recognize and, on request, bargain collectively and in good faith with NMDU as the exclusive representative of the employees in the drivers/mailroom unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment.

(c) Offer all locked-out mailroom employees/drivers immediate and full reinstatement to the jobs they held

immediately before 9 February 1981 or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any replacements hired in their places while they were locked out, and make them whole for any loss of earnings they suffered by reason of the discrimination against them, in the manner provided for in the "Amended Remedy" section, above.

(d) Offer Dale Rim immediate and full reinstatement to his former job or, if it no longer exists, to substantially equivalent employment without prejudice to seniority, or other rights or privileges, and make him whole for any lost earnings he suffered, in the manner provided for in the section of the judge's decision entitled "Remedy."

(e) Offer to the composing room employee strikers immediate and full reinstatement to their former or substantially equivalent positions and make them whole in the manner provided in the "Amended Remedy" section, above.

(f) Meet and bargain, on request of Local 103, with the bargaining committee selected by Local 103, including any representative of other unions whom Local 103 has invited or designated to attend the negotiations for the purpose of participating in the discussions and advising and consulting with Local 103.

(g) Remove from their records all references to their discharge of Dale Rim as a disciplinary action and notify him in writing thereof.

(h) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(i) Post at its Paterson and Union City, New Jersey facilities copies of the attached notice marked "Appendix"[29]. Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(j) Mail a signed copy of the notice to each of the striking composing room employees and the locked-out mailroom employees/drivers at the address for each employee given the Respondents by the Regional Director for Region 22.

(k) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not found herein.

Dated, Washington, D.C. 13 July 1984

DONALD L. DOTSON, Chairman

ROBERT P. HUNTER, Member

NATIONAL LABOR RELATIONS BOARD

(SEAL)

[29] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

MEMBER ZIMMERMAN, concurring in part and dissenting in part.

Contrary to my colleagues, I would affirm the judge's findings that the Respondent's layoff of eight editorial employees was unlawfully motivated, that a *Gissel* bargaining order is warranted for the editorial unit, that the Respondent engaged in unlawful bad-faith bargaining with respect to the composing room unit, and that the composing room employees' strike was caused and prolonged by the Respondent's unfair labor practices. Accordingly, I join the majority opinion only insofar as it concerns the mailroom employees/drivers unit and finds certain violations in connection with the editorial and composing room employees.[1] I depart from my colleagues' decision, however, in almost all substantial respects concerning the editorial and composing room employees.

Although my colleagues choose to analyze each of the three units separately, it is clear that the Respondent's actions as to each group were not isolated. Rather they were parts of the Respondent's coordinated course of conduct designed to evade what it perceived as the increased costs of collective bargaining. Those actions were taken primarily by or at the direction of one individual—Dean Singleton—during a period of several months at the end of 1980 and beginning of 1981.

Turning first to the editorial employees, I find no basis for reversing the judge's conclusion that eight reporters were discharged in October 1980 in order to thwart the organizing campaign then being conducted

---

[1] Thus, I join them in finding that as to the mailroom employees/drivers unit the Respondent unlawfully: (1) unilaterally changed the work assignment; (2) effectively discharged the employees by locking them out; and (3) withdrew recognition from their bargaining representative, Newspaper and Mail Deliverers Union of New York and Vicinity.

by ITU Local 103, which had represented the Respondent's composing room employees since 1965. From the outset of the campaign, supervisors warned editorial employees not to discuss unionization and reminded them that soliciting for authorization cards could cause someone to lose his job. Further, an employee was told by a supervisor that he received calls every day from his managing editor and the executive director asking which employees should be fired in order to block Local 103.

My colleagues correctly have decided to adopt the judge's finding of various 8(a)(1) violations in the warnings and threats of discharge directed at editorial employees.[2] Despite these violations, however, the majority has determined that the judge erred in finding unlawful the summary discharge at the peak of union activity of eight reporters, seven of whom had signed Local 103 authorization cards. I see no need to repeat in detail the judge's thorough and lengthy discussion of the evidence regarding the layoffs of his well-reasoned application of the law to that evidence. My colleagues' cursory treatment of the layoff issue, however, calls for a summary of the General Counsel's strong prima facie case of discrimination and the ample evidence supporting the rejection of the Respondent's economic defense.

On 23 October 1980, Local 103 filed a petition for an election covering the editorial unit. On 24 October, seven editorial employees were laid off. Six of those seven had signed Local 103 authorization cards,[3] and three of them comprised half of the editorial department's in-plant organizing committee. During the next few days three more editorial employees were laid off, two of whom had

---

[2] I join in finding that the Respondent unlawfully discharged editorial employee Dale Rim for refusing to perform struck work.

[3] The nonsigner, Goldensohn, was recalled in February 1981 and is now a city editor.

signed Local 103 cards.[4] According to the credited testimony, employees were told by supervisors at the time that the Respondent was laying off people it felt were "not happy" there, and one supervisor told an employee that the layoffs were "union busting." No advance notice was given to any of the employees that they were to be laid off. One of them had received a merit pay raise 2 weeks before his layoff, and another was told shortly before her layoff that she was making excellent progress in her probationary period.

My colleagues apparently do not find that the General Counsel made out a prima facie case that the layoffs were discriminatorily motivated.[5] They do so despite the animus evidenced by the found 8(a)(1) warnings and threats, the clear proof of the Respondent's knowledge of the employees' union activity,[6] the summary nature of the layoffs and their proximity to Local 103's petition for an election, the "not happy" and "union busting" statements made in explanation of the layoffs by certain supervisors, the hiring of replacements for the laid-off employees only 3 months after the layoffs,[7] and the re-

---

[4] One of these employees—Neustadt—was recalled after he had told Managing Editor Smith that it was ironic he was laid off inasmuch as he had not been too active in the union drive.

[5] Thus, the majority states that "[A]nd even assuming the General Counsel had proved a prima facie case . . . ."

[6] In addition to the filing of the petition, the Respondent knew the identity of the members of the in-plant organizing committee (on which three of the laid-off employees served), issued 8(a)(1) warnings about union activity directed toward one of the laid-off employees who was not on the in-plant committee, and certain of the 8(a)(1) warnings and threats indicate that card solicitation was done openly in the presence of supervisors.

[7] The Respondent hired new reporters 25 January, 3, 9, 16, and 22 February 1981. During the same time the Respondent failed to recall any of the eight alleged discriminatees laid off in late October. In fact, within about 5 months after the layoffs the Re-

fusal to recall any of the laid-off employees until "the suit is settled."[8] It would take an admission of guilt to make out a stronger prima facie case than that established by these circumstances and events.

The Respondent contended that the October 1980 layoffs were for purely economic reasons, and it offered evidence establishing that the two newspapers in question here had suffered operating losses for a number of years. The judge acknowledged that the papers were in poor financial condition, but he concluded that the economic defense was a pretext in view of the "unsupported, inconsistent, shifting, contradictory and patently improbable reasons proffered" as to both the decision to effect a layoff between 24 and 27 October and as to the basis for the selection of those laid off.[9] The judge's detailed

---

sponden had hired nine new reporters. There is no indication that the economic conditions that existed in October had changed in the interim.

[8] This quoted remark was made by Executive Editor Vezza to laid-off reporter Vogel when the latter called the former in January 1981 to ask for her job back.

[9] For example, during the hearing the Respondent took the position that McDonnell—a member of the in-plant organizing committee—was selected for layoff because he had signed an undated letter critical of John Buzzeta, the publisher of the Paterson News, which had been sent to Joseph Allbritton. McDonnell testified without contradiction that the letter was sent several months before the layoff and that Buzzetta had met in the summer of 1980 with the reporters who signed it to assure them that there would be no reprisals against any of them. Twenty-four reporters signed the letter, including at least two who later were promoted to the supervisory level. In addition, the Respondent claimed at the hearing that McDonnell's layoff also was based on his having written a story which led to a libel suit. No reference was made to any such story when he was laid off. McDonnell acknowledged that he had heard that the Respondent had settled a libel claim arising from a story he had written several months before his layoff and which had been edited and approved by his supervisors prior to publication. Further, the Respondent asserted at the hearing that an-

discussion substantiates the accuracy of his characterization of the Respondent's defense.

My colleagues make no attempt to cite evidence supporting the Respondent's economic defense, for there is none.[10] Instead, they offer only the general declaration that the judge's analysis of that defense "intruded more than slightly into an area of managerial authority reserved to the Respondents not intended to be subject to second-guessing by the Board." In other words, according to the majority the mere assertion of an economic defense makes it so. It is fundamental that whenever, as here, it is necessary to determine the motive for a respondent's actions, the allegedly legitimate reasons advanced for such actions must be examined. That is just

---

other possible reason for McDonnell's selection for layoff was that he was looking for employment elsewhere. The Respondent, however, offered no support for this assertion. As to Fischer—another member of the in-plant organizing committee—the Respondent contended that he was selected for layoff because he had embarrassed the paper by his inept coverage of a traffic-related story during the summer of 1980. Fischer, however, was one of several reporters subsequently assigned to cover the Democratic national convention, and the Responded conceded that it wanted its most qualified reporters to cover that event. McDonnell also was selected to cover the convention, and he received a merit pay raise 2 weeks before his layoff.

[10] The majority's statement that "[T]he judge did not purport to deny that a layoff was economically justified" is simply incorrect. On the contrary, the judge expressly found that the operating losses being suffered by the Respondent at the time of the layoffs were no different from those it had suffered for many years. Thus, he determined that the only new factor in the Respondent's operations which could have caused the unprecedented layoff of editorial employees was Local 103's organizing effort. He therefore concluded that the Respondent's economic justification was pretextual.

Assuming, as the judge stated, that the economic facts supported the Respondent's demand for give-backs in the composing room negotiations, the judge found no such facts supporting the layoffs in the editorial unit.

what the judge did in this case. His examination did not entail—as suggested by the majority—an improper substitution of the Board's business judgment for that of the Respondent. Instead, the judge merely engaged in an independent evaluation of all the facts and circumstances surrounding the layoffs in order to ascertain the actual reasons for them.

One aspect of the judge's evaluation which my colleagues single out for criticism is his refusal to accept Singleton's claim that the layoffs were mandated by the rejection of the editorial department's budget. The majority charges that the judge placed "far too much emphasis" on details of the budget approval process, which my colleagues call an "artificial issue." But my colleagues' assertion ignores that the Respondent itself made the alleged rejection of the budget a central element of its economic defense. Given the Respondent's contention that the rejection of the budget triggered the layoffs, the judge properly considered whether the evidence demonstrated that that contention was true. He placed no more emphasis on the details of the budget approval process than was waranted by the Respondent's argument that the budget required the layoffs. The credited testimony as to this matter shows the following: In June or July 1980, Singleton instructed Richard Vezza, the two newspapers' executive editor, to prepare the editorial departments' budget for the fiscal year beginning 1 October 1980. Vezza asked Singleton if he could hire employees and was told that he could not but that he could provide for a very modest wage increase for the editorial employees. Vezza asked if he could, by cutting costs elsewhere, provide for more substantial wage increases. Singleton replied that that sounded fine and that he should work it out and submit the budget. In late August or early September 1980, Singleton accepted the budget Vezza prepared and did not ask him to revise it. Under this budget, Vezza hired five reporters

as replacements in September and early October and granted wage increases.[11] On 24 October, Singleton told Vezza that the editorial staffs of the two newspapers had to be cut that evening. Vezza never received a revised budget, but worked from the one he had given Singleton 2 months earlier.

Fred Antoniotti, the vice president in charge of finance for the newspapers, testified that during the normal review of the budget prior to the beginning of the fiscal year 1 October Vezza's payroll for the editorial departments was "shaved down a little." The budget Vezza prepared then was accepted, and Antoniotti incorporated it into the final draft. He stated that no changes were made in the budget after that.

The judge found that the evidence controverted Singleton's testimony—relied on by the majority—that the editorial department budget was rejected 24 October. In addition, the Respondent submitted no independent evidence or documentary material to establish that it was essential to its economic survival that 10 employees be laid off that very day.[12] Further, the Respondent presented no evidence that the selection of reporters for layoff was based on seniority, job performance, or any other objective criteria. In these circumstances, the Respondent's asserted economic defense cannot withstand scrutiny in the face of the overwhelming evidence that the layoffs were discriminatorily motivated.

---

[11] Including, as mentioned earlier, a merit raise to reporter McDonnell 2 weeks before he was laid off. As the judge noted, it is difficult to accept the Respondent's economic defense to the layoffs in the face of the Respondent's hiring five new reporters and giving other reporters wage increases.

[12] The judge rejected the Respondent's contention that it took into account "industry guidelines" in deciding to reduce its editorial staff by 10 reporters. The Respondent offered nothing more than vague correlations between staff size and circulation.

Just as I agree with the judge's findings concerning the unlawful warnings, threats, and layoffs in the editorial unit, I agree with his recommendation that a *Gissel* bargaining order is warranted to remedy these unfair labor practices.[13] In this regard, the judge stated:

> I have found that eight editorial employees were permanently laid off at the height of Local 103's campaign and that they were put out of Respondent's premises immediately on Respondent's orders. When one sought to return after learning that Respondent was hiring new employees in its editorial unit, she was told that she would not be hired as long as this case is open. Another employee was told that Respondent would use the judicial system itself to frustrate Local 103's effort to represent the editorial employees. Another was told that Respondent would punish Local 103 for attempting to organize the editorial employees. When the employees in the sports section of Respondent Dispatch crossed the Local 103 composing room picket line, virtually all were given unexpected raises. In view of the foregoing and the other unfair labor practices found above, I find that the possibility of erasing the effects of that conduct and of holding a fair election by the use of traditional remedies is slight and that the expression of the wishes of the majority of the unit employees, as evidenced by the authorization cards they signed, would be, on balance, better protected by a bargaining order.
>
> That finding is buttressed separately by the unlawful conduct Respondent evidenced towards employees in the composing room unit . . .; the "fallout" from those other unfair labor practices had to have

---

[13] On 24 October 1980—the day the layoffs began—a majority of the editorial unit employees had designated Local 103 as its bargaining representative.

reached into the editorial unit, especially as the same labor organization was involved.

I also dissent from my colleagues' reversal of the judge's finding that the Respondent violated Section 8 (a) (5) by refusing to bargain in good faith with Local 103 over a new contract covering the composing room employees.[14] The judge found that the Respondent negotiated with Local 103 with a fixed intent to force the Union to give back $35 in weekly wages per employee, and that it never seriously considered any alternative. My colleagues place undue weight on the mechanics of bargaining, and fail to consider the totality of the circumstances surrounding the negotiations. Those circumstances clearly show that the Respondent never intended to engage in the give-and-take of collective bargaining, but rather was predisposed to a course of conduct designed to preclude the reaching of an agreement and, in fact, threatened to fire all the composing room employees if they and their Union did not agree to the Respondents' demands.

As discussed above, in October 1980 Local 103 notified the Respondent that it had organized the editorial employees and that it was requesting bargaining on the basis of a card majority. At the same time, the Respondent and Local 103 were preparing to negotiate a new contract for the composing room unit, which the Union had represented for a number of years. The parties faced a 25 January 1981 contract expiration date. In late October—prior to the start of negotiations

---

[14] I join the majority in affirming the judge's findings that the Respondent vilated Sec. 8(a)(5) and (1) by refusing to bargain with Local 103 with an NMDU official present, violated Sec. 8(a)(1) by threatening to break off negotiations with Local 103 if the composing room employees honored the NMDU's picket line, violated Sec. 8(a)(3) and (1) by rejecting Local 103's unconditional offer to return to work 25 June 1981, and violated Sec. 8(a)(1) by promising benefits to induce employees to seek Local 103's decertification.

—Singleton told the director of operations at the Paterson News that Singleton would "punish" Local 103 for trying to organize the editorial employees and would not give the composing room employees a raise.[15]

As set forth in more detail by the judge, from the first negotiating meeting on, the Respondent insisted that it had to save $35 weekly per employee in wages in order to continue operating the newspapers and it did so in a manner which left open no room for compromise. For example, at the second bargaining session, the Respondent's chief negotiator stated that the Respondent would stick to the wage give-back proposal "no matter what." At this meeting, the Respondent rejected the Union's suggestion that the parties discuss vacations and other fringe benefit matters as a possible way to cut costs in the composing room. At the fourth bargaining session, Singleton declared that his "bottom line" demand was the $35 wage give-back, and he set a deadline of 10 February for the Union's acceptance of this demand. On 29 January, at the next meeting, Singleton told Local 103's president that he better tell his people that Singleton wanted that $35 back "no ifs, ands or buts," and that if he did not get the $35 back, "the Local 103 people do not work for" the Respondent any more. Singleton then said, "I don't give a damn about people anymore. I only care about my paper. Any printer, driver, or pressman who gets in my way, I'll roll right over him." At the next bargaining meeting 6 February, the Respondent offered its "final proposal," specifically the $35 wage give-

---

[15] The judge's finding that Singleton made these statements was based on an employee's testimony concerning what he had been told by the director of operations. The employee's credited testimony constitutes prima facie proof that Singleton made the statements, either because it is a nonhearsay admission made by the director of operations as the Respondent's agent (Fed.R.Evd. 801 (d)(2)(D)) or is hearsay that is admissible because of its reliability. See *Roofers Local 135 (Advanced Coatings)*, 266 NLRB No. 60, fn. 1 Mar. 4, 1983.

back. When Local 103's president stated that the Union could not accept the pay cut, Singleton handed him a piece of paper containing the terms under which the Respondent would employ the composing room employees as of 10 February. Later that day, the Respondent posted a notice in the composing room which stated that effective 10 February there would be a $35 decrease in the weekly wage rate of the employees and that the expired contract would in all other respects continue in effect until a new contract could be agreed upon. The notice further required that the employees give written acceptance of these conditions by 10 February or be replaced. So much for what my colleagues euphemistically call "straightforward bargaining."

In finding no bad-faith bargaining, the majority characterizes the statements by the Respondent's negotiators as "nonsubstantive remarks" and "bluster and banter." It simply is disingenuous to refer to the Respondent's repeated demands for a substantial wage reduction as being "nonsubstantive" or to label as "bluster and banter" Singleton's threat that unless he got the $35-a-week wage concession the union-represented composing room employees would no longer work for the Respondent. Similarly, the Respondent's announcements early in the negotiations that it would stick to the wage cut demand "no matter what," that it would get the $35 back without any "ifs, ands or buts," and that the wage cut was its "bottom-line" demand, all evidence much more than "hard bargaining." On the contrary, the Respondent's conduct at the bargaining table evidences a rejection of the concept of good-faith collective bargaining, and instead shows a "take it or leave it" attitude calculated to produce no agreement. An employer may quite properly declare during negotiations that a $35-wage reduction is economically necessary; but it is quite another thing for an employer—such as the Respondent—to state that employees will be fired and replaced if they do not make

such a concession. Here, the Respondent's announcement that employees who did not accept its posted 10 February conditions would be replaced is totally at odds with good-faith collective bargaining.[16] Indeed, that posting constituted direct dealing with the employees in derogation of their exclusive collective-bargaining representative.

In addition to the statements during bargaining, the Respondent's away-from-the-table conduct demonstrates an intent not to reach an agreement with Local 103. Thus, in January 1981, one of the Respondent's managers told a composing room employee that the Company intended to post new working conditions for the composing room employees and that "if the Union doesn't go along with these working conditions, there is no amount of money Allbritton wouldn't spend to see to it that you never have a union in here again." Further, the fact that during the negotiations the Respondent prepared 150 copies of a training manual to be used by new employees in the composing room strongly suggests that the Respondent never intended to reach an agreement covering its then current complement of composing room employees—an inference that is given additional credence by Singleton's threats to discharge employees who did not accept the decrease in pay. And, as my colleagues

---

[16] Contrary to my colleagues, I would find that Singleton's statement that the employees would no longer work for the Respondent constituted an independent violation of Sec. 8(a)(1). Similarly, a statement to the same effect in the 10 February notice to employees also violated that section of the Act. See *Admiral Merchants Motor Freight*, 265 NLRB 134 (1982), and 264 NLRB 54 (1982). These statements indicate an intent to discharge. They have no relevance to lawful bargaining. In particular, and contrary to my colleagues' assertion, the notice did more than require employees to signify acceptance of lower wage rates as a "precaution" for the Respondent. It informed them that they would be fired if they did not agree to a bargaining demand that their Union had resisted.

have found, Singleton unlawfully stated on 9 February that he would break off negotiations with Local 103 and that there would be no more bargaining if the composing room employees honored the picket line established by the unlawfully discharged mailroom employees/drivers.

In evaluating the Respondent's bargaining tactics, the judge properly considered the connection between the composing room negotiations, the unlawful lockout of the mailroom employees, and the unlawful threats and discharges in the editorial employees unit. To have done otherwise would have been to ignore the context in which that bargaining occurred. My colleagues have fundamentally misconstrued the judge's reference to, and reliance on, that context. In belittling that aspect of the judge's decision, the majority has failed to alter the fact that the judge did nothing more than correctly point out the consistency between the Respondent's conduct at and away from the bargaining table.[17]. The Respondent's approach to collective bargaining was clearly shown by its aforementioned statements at the bargaining table, and it also was revealed by its other conduct with respect to the composing room employees, mailroom employees, and editorial employees. That conduct cannot so easily be ignored.

The judge also properly found that the Respondent's actions after the start of the Local 103 strike on 13 February—taken to protest the Respondent's bad-faith bargaining—underscored the Respondent's rejection of

---

[17] Contrary to my colleagues' assertion, it required no clairvoyance on the Respondent's part to recognize that the composing room employees probably would honor a picket line established by the unlawfully locked-out mailroom employees, and thus present the Respondent with a convenient excuse to cut off bargaining and replace the composing room employees. In fact, that is precisely what happened.

collective bargaining.[18] In this regard, the Respondent unlawfully refused to bargain with Local 103 because its negotiating team included NMDU's president; Singleton told Local 103 representatives that he did not care if Local 103 stayed out forever as "they are never coming back to work" and he is "not meeting with them"; the Respondent unlawfully rejected Local 103's unconditional offer to return to work 25 June 1981; and the Respondent unlawfully promised benefits to induce composing room employees to attempt to have Local 103 decertified.

Unlike my colleagues, I would also—for the reasons set forth by the judge—find that the Respondent unlawfully resisted arbitration of a contract dispute over the payment of unused vacation and personal days and acted unlawfully in bringing a conspiracy suit in state court against every striking composing room employee for pursuing workers' compensation claims.

As to the former issue, the General Counsel alleged that the Respondent unlawfully refused to agree to arbitrate Local 103 grievances involving claims for striking employees' accrued vacation and personal leave pay. The Respondent contended that these claims were matters for contract negotiations, not for the grievance-arbitration procedure of the expired contract. The judge concluded that Respondent could not argue that the matter should be resolved through bargaining, when at the same time it was engaged in bad-faith bargaining with Local 103. I agree. This is another instance in which the Respondent penalized its employees for supporting Local 103, and the unlawful nature of that conduct is not erased by the Respondent's ultimate arbitration of the claims.

With regard to the second issue, the Respondent's state court action alleged that the workers' compensation were filed to harass it. The Board has long held that the filing of workers' compensation petitions is an activity protected by Section 7. The judge correctly found that,

in the circumstances here, the Respondent's lawsuit had the potential for chilling the exercise of protected rights, and that the Respondent's unlawful motivation was demonstrated by the fact that it filed suit against *all* striking employees, and not merely those who had filed claims.

In sum, I would affirm the well-reasoned findings and conclusions of the judge concerning the issues arising in the editorial and composing room units. In reversing those findings and conclusions, the majority has taken positions that conflict with the great weight of the evidence and have in large part excused the Respondent's egregious attack on the concept of collective bargaining and on individual employee rights. I therefore dissent.

Dated, Washington, D.C. 13 July 1984

DON A. ZIMMERMAN, Member
NATIONAL LABOR RELATIONS BOARD

---

[18] As mentioned previously, I would affirm the judge's finding that this strike was an unfair labor practice strike from its inception because it was caused and prolonged by the Respondent's bad-faith bargaining.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT unilaterally change the assignments of work and the method and procedure by which newspapers are "topped" by the mailroom employees/drivers without notice to or bargaining with Newspaper and Mail Deliverers Union of New York and Vicinity (NMDU).

WE WILL NOT lock out and replace the mailroom employees/drivers because they are members of, or give assistance or support to, NMDU.

WE WILL NOT warn our employees against discussing, or signing authorization cards for, Newark Typographical Union No. 103, International Typographical Union, AFL-CIO (Local 103).

WE WILL NOT threaten to discharge our employees if they support Local 103.

WE WILL NOT threaten to refuse to bargain with Local 103 to discourage our employees from honoring a lawful picket line.

WE WILL NOT promise benefits to encourage our employees to solicit other employees in order to have Local 103 removed as bargaining agent of our composing room employees.

WE WILL NOT discharge employees because they support Local 103 by having refused to perform work normally done by striking composing room employees.

WE WILL NOT refuse to accept strikers' unconditional offer to return to work.

WE WILL NOT fail and refuse to bargain collectively with NMDU as the exclusive representative of the unit of employees described as follows:

> All employees of the Employer performing the following operations: driving of trucks; loading of trucks; making foot deliveries to dealers, agents, and carriers; making truck deliveries; tying and bundling papers; wrapping mail; shuffling papers; related operations; and manning of return room, if any, at the Paterson plant; excluding all other employees, guards and supervisors as defined in the Act.

WE WILL NOT fail or refuse to deal with individuals designated by Local 103 as its agents for purposes of collective bargaining for the employees in the composing room.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reinstate the method and procedure by which newspapers were "topped" prior to our unilateral change on 9 February 1981.

WE WILL recognize and, on request, bargain collectively and in good faith with NMDU as the exclusive representative of the employees in the drivers/mailroom unit described above with respect to rates of pay, wages, hours, and other terms and conditions of employment.

WE WILL offer all locked-out mailroom employees/drivers immediate and full reinstatement to the jobs they held immediately before 9 February 1981 or, if those jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging if necessary any replacements hired while they were locked out, and WE WILL make them whole for any loss of earnings they suffered by reason of our discrimination against them, with interest.

WE WILL offer DALE RIM immediate and full reinstatement to his former job or, if it no longer exists, to substantially equivalent employment without prejudice to seniority or other rights or privileges, and make him whole for any lost earnings he suffered, with interest.

WE WILL offer to the composing room employee strikers immediate and full reinstatement to their former or substantially equivalent positions and make them whole for any lost earnings they suffered by reason of our discrimination against them, with interest.

WE WILL meet and bargain, on Local 103's request, with the bargaining committee selected by Local 103, including any representatives of other unions whom Local 103 has invited or designated to attend the negotiations for the purpose of participating in the discussions and advising and consulting with Local 103.

WE WILL notify Dale Rim that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

ALLBRITTON COMMUNICATIONS, INC., and ITS WHOLLY OWNED SUBSIDIARIES THE NEWS PRINTING COMPANY, INC. and THE HUDSON DISPATCH

(Employers)

Dated ..... By .....

(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Federal Building, Room 1600, 970 Broad Street, Newark, New Jersey 07102, Telephone 201-645-3652.

JD-(NY)-85-82
Paterson and Union City, NJ

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH
NEW YORK, NEW YORK

Case Nos. 22-CA-10386
22-CA-10645
22-CA-10647
22-CA-10682
22-CA-11014
22-CA-11045
22-CA-11307
22-CA-11338

ALLBRITTON COMMUNICATIONS, INC., AND
ITS WHOLLY OWNED SUBSIDIARIES, THE
NEWS PRINTING COMPANY, INC. AND
THE HUDSON DISPATCH

and

NEWARK TYPOGRAPHICAL UNION NO. 103,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO

Case Nos. 22-CA-10639
22-CA-11212

ALLBRITTON COMMUNICATIONS, INC., AND
ITS WHOLLY OWNED SUBSIDIARIES, THE
NEWS PRINTING COMPANY, INC. AND
THE HUDSON DISPATCH

and

NEWSPAPER AND MAIL DELIVERERS
UNION OF NEW YORK AND VICINITY

and

T & T NEWS COMPANY, INC.
Party In Interest

Case No. 22-CA-11313

ALLBRITTON COMMUNICATIONS, INC., AND
ITS WHOLLY OWNED SUBSIDIARIES, THE
NEWS PRINTING COMPANY, INC. AND
THE HUDSON DISPATCH

and

STEVEN THOMPSON, An Individual

C. John Cicero, Esq., *Celeste J. Mattina, Esq.*, and *Hope Singer, Esq.*, for the General Counsel.

Richard W. Beckler, Esq., *Joyce E. Reback, Esq.*, and *David M. Foster, Esq.*, (*Fulbright and Jaworski*), of Washington, DC, and *William D. Toney, Esq.*, (*Pray, Walker, Jackson, Williamson & Marlar*) of Tulsa, OK, for Respondents Allbritton Communications, Inc., and its wholly owned subsidiaries, The News Printing Company, Inc., and The Hudson Dispatch.

Jack Wysocker, Esq., (*Mandel, Wysocker, Sherman, Glassner & Weingartner*) of New Brunswick, NJ, for Newark Typographical Union No. 103, International Typographical Union, AFL-CIO.

Marshall E. Lippman, Esq., (*Lippman & Weber*), New York, NY, for Newspaper and Mail Deliveries Union of New York and Union City.

S.M. Chris Franzblau, Esq., (*Franzblau & Falkin*), Newark, NJ, for T & T News Company, Inc.

DECISION

TABLE OF CONTENTS

Topic	*Page No.*
Statement of the Case	3
Findings	
I. Jurisdiction	4
II. Single Employer Issue	5
III. Mailroom Employees/Drivers	6
A-F (Facts)	6-19
G (Analysis)	20
IV. Editorial Employees	
A-D. (Facts)	24-30
E. (Analysis: warnings, discharges)	30
F. Rim's discharge	33
G. Macaluso's discharge	34
H. Card majority	35
I. *Gissel* remedy	36
V. Composing room employees	
A-C. (Facts)	38-56
D. Analysis: Bad-Faith bargaining	56
E. Analysis: Refusal to Reinstate Strikers	58
F. Analysis: Composition of Negotiation Committee	59
G. Analysis: Threats, warnings	59
H. Analysis: Vacation pay, personal days	60
I. Alleged Unlawful Law Suit	62
J. Alleged Decertification Effort	64
Conclusions of Law	66
Remedy	69
Order	71
Notice	Appendix

Statement of the Case

JAMES F. MORTON, Administrative Law Judge: I heard this case on 33 days between February 1 and June 6, 1982. The issues relate to the operations of two daily newspapers, the News published in Paterson, New Jersey, by the News Printing Company, Inc., (herein called Respondent News) and the *Dispatch*, published in Union City, New Jersey, by the Hudson Dispatch (herein called Respondent Dispatch). Respondent News and Respondent Dispatch are wholly-owned subsidiaries of Allbritton Communications, Inc., (herein called Respondent Allbritton). The complaint, as amended, alleges that Respondent News, Respondent Dispatch and Respondent Allbritton are a single employer and refers to all three jointly as the Respondent; that allegation is denied in the answer.

The issues in this case pertain also to three separate groups of employees—mailroom employees/drivers, editorial employees and composing room employees. Some of the issues relating to the first group, the mailroom employees/drivers are whether or not Respondent (1) is their employer jointly with T & T News Company Inc., (herein called T & T), (2) unilaterally changed their terms of employment, (3) unlawfully locked them out, (4) unlawfully refused to reinstate 30 striking mailroom employees/drivers upon their unconditional application to return to work and (5) unlawfully withdrew recognition from their collective bargaining representative, Newspaper and Mail Deliveries Union of New York and Vicinity (herein called NMDU).

Some of the issues affecting the second group of employees, the editorial department employees, are (1) whether Respondent discharged ten of them because they supported Newark Typographical Union No. 103, International Typographical Union, AFL-CIO (herein called Local 103), (2) whether a majority of the editorial employees signed Local 103 cards and (3) whether a *Gissel* bargaining order remedy is appropriate.

Some of the issues pertaining to the last group of employees i.e.—the composing room employees, are whether Respondent (1) engaged in surface bargaining with Local 103 as their representative (2) unilaterally changed their wage rates and working hours, (3) unlawfully failed to reinstate approximately 50 striking composing room employees upon their allegatedly unconditional application to return to work (4) unlawfully sued the striking employees in a civil action in a state court, (5) promised benefits to induce one of them to file a petition to decertify Local 103 and (6) unlawfully withheld accrued benefits due striking employees and refused to arbitrate that matter.

The pleadings, as amended, also place in issue allegations that Respondent threatened employees with discharge and engaged in other coercive conducts in violation of Section 8(a)(1) of the National Labor Relations Act, as amended (herein called the Act). These and other issues will be set forth as they arise in the discussion that follows:

All of the above captioned cases were consolidated by order issued on January 18, 1982. On that date, the third amended complaint also issued.[1]

Upon the entire record, including my observation of the demeanor of the witnesses and upon consideration of the briefs filed with me by Counsel for the General Counsel and by Counsel for Respondent; I make the following:

Findings

I. Jurisdiction

Based on the pleadings as amended, I find that Respondent Allbritton, Respondent News and Respondent

---

[1] The original complaint had issued on December 21, 1980; it was amended on June 24, 1981; again on December 10, 1981 and also during the hearing.

Dispatch are each an employer engaged in commerce within the meaning of Section 2(2),(6) and (7) of the Act. Counsel for Respondent Allbritton, Respondent News and Respondent Dispatch declined to stipulate that Local 103 or NMDU are labor organizations within the meaning of the Act. As is readily evident from the uncontroverted facts set out and detailed below in this decision, Local 103 and the NMDU each meet the definition of a labor organization as set forth in Section 2(5) of the Act and I therefore find that they are labor organizations within the meaning of the Act.

II. Whether Respondent Allbritton, Respondent News and Respondent Dispatch Constitute a Single Employer

As noted before, the allegation that Respondent Allbritton, Respondent News and Respondent Dispatch comprise a single employer within the meaning of the Act is in issue. The record in the instant case discloses the following relevant facts as to that issue.

On October 23, 1980, Local 103 filed a petition with the regional office of the Board in Newark whereby Local 103 sought an election among the approximately 80 editorial department employees employed by Respondent News at its facility in Paterson, New Jersey. A hearing was held in that case, Case No. 22-RC-8359, at which Local 103 had contended that Respondent News and Respondent Dispatch constitute a single employer. Extensive testimony on that contention was taken at that hearing. The Regional Director issued a Decision and Direction of Election in which he found that Respondent News and Respondent Dispatch constituted a single employer under the Act. A request for review was filed with the Board. That request was denied insofar as it pertained to the finding of single employer.

The only new testimony that was offered in the hearing before me, respecting the interrelationship of Respondent News and Respondent Dispatch, was the testi-

mony offered by the General Counsel through the individual in charge of the sports copy desk at Respondent Dispatch. The testimony he offered, in my view, was a restatement of testimony already received and considered in the earlier representation proceeding.

No issue had been raised at the earlier representation proceeding respecting whether or not Respondent Allbritton was a single employer along with Respondent News and Respondent Dispatch. Nevertheless, extensive testimony which bears on that matter had been taken in the course of that representation case hearing. The principal witnesses in the hearing before me had testified exhaustively on substantially the same points during the representation case hearing. Those individuals are Dean Singleton, executive vice-president of Respondent Allbritton who is also president of its newspaper division and, in addition, president of Respondent News and president of Respondent Dispatch; John Buzzetta, vice-president of the newspaper division of Respondent Allbritton and also publisher of Respondent News; and Richard Vezza, executive editor of both Respondent News and Respondent Dispatch during 1980 and 1981.

There have been some minor changes in the intercorporate structure since the close of the representation case hearing. Thus, Singleton testified before me that, since the close of the representation case hearing, Respondent Allbritton has purchased the outstanding preferred stock of Respondent News and that Respondent Allbritton now owns all of the corporate stock of Respondent News. Singleton also testified before me that, in mid-1980 at a time when he was not an officer of Respondent News and when he was an official of Respondent Allbritton, he interrupted a business trip to return to the Paterson facility of Respondent News to work with the then president of Respondent News to resolve a work stoppage by employees represented by the NMDU. That matter was completed within a few

days. The then president of Respondent News resigned and Singleton thereupon assumed his office. The record in the instant case shows also that Singleton actively participated in collective bargaining with Local 103 for a renewal contract of the composing room employees located at the Paterson facility. In addition, there is testimony in the representation case proceeding that Singleton, as executive vice president of Respondent Allbritton, approved departmental budgets prepared by the respective departmental supervisors of Respondent News and Respondent Dispatch. At the hearing before me, Singleton testified that he approved those budgets also in his capacity as president of Respondent News and Respondent Dispatch respectively. In any event, he testified that those budgets were forwarded to the Washington office of Respondent Allbritton. Further, income tax returns and related schedules for Respondent News and Respondent Dispatch were prepared by the vice president in charge of finance for Respondent News and Respondent Dispatch; he then transmitted those documents to Respondent Allbritton in Washington for further processing.

Based upon the record in the instant case, together with that made in the earlier representation case which has been incorporated into the instant case, I find that Respondent Allbritton, Respondent News and Respondent Dispatch are commonly owned, have integrated operations, share common management and that officials of Respondent Allbritton exercise centralized control of the labor relations policies governing employees of Respondent News and Respondent Dispatch. Accordingly, they constitute a single employer.[2]

---

[2] *Malcolm Boring Co., Inc., B. C. Malcolm and Bruce C. Malcolm,* 259 NLRB No. 81 (1981); *Royal Typewriter Company, a Division of Litton Business Systems, Inc.* a subsidiary of *Litton Industries, Inc. and Litton Industries, Inc.,* 209 NLRB 1006, (1974) enf. 533 F2d 1030 (8 Cir., 1976).

III. The Mailroom Employees/Drivers

A. The Formation of T & T

As noted above, the issues in this case pertain to three employee groups. The first group to be discussed is comprised of about 30 men who worked in the mailroom of Respondent News and who also drove trucks to deliver its newspapers to retail stores and to locations where they dropped off newspaper bundles to newsboys for home delivery. These mailroom employees/drivers were paid by checks issued by T & T. The General Counsel and the NMDU contend that Respondent News and T & T were the joint employer of that group of mailroom employees/drivers. Respondent denies that it is their joint employer. The General Counsel further contends, and Respondent denies, that Respondent unlawfully locked those employees out on February 9, 1981 and engaged in other unlawful conduct toward them. A brief background discussion will help put the issues in focus.

Respondent News had published the *News* for many decades before Respondent Allbritton purchased it in 1977. In about 1935, Respondent News had contracted with a company apparently now defunct, Silk City Distributing Company, Inc., to perform the mailroom and delivery operations. Peter Trombina worked as a mailroom employee/driver in 1965 at Respondent News' plant in Paterson; his father, Louis Trombina, was then a foreman on the Silk City payroll working also in that mailroom. Both Louis and Peter Trombina were members of the NMDU which represented the mailroom employees/drivers there. The News' circulation manager asked them if they were interested in forming their own company to replace Silk City. They were told then by the circulation manager that they would have to hire all the mailroom employees/drivers then on the Silk City payroll and that they would work exclusively for Respondent News. They

accepted and formed T & T as a family corporation. Louis Trombina is president; Peter is vice-president. In recent years Peter has overseen the day to day activities in the mailroom which include hiring; Louis has played a less active role.

In 1965 and until 1977 the T & T office consisted of a few desks and filing cabinets in the circulation department of Respondent News. In 1977, after Respondent News was purchased by Respondent Allbritton, an office was built for T & T in the mailroom, adjacent to the circulation manager's office. Respondent News furnished that office and provided air-conditioning, telephone service and other amenities to T & T without cost. In January 1981, that all changed, as discussed further below.

B. The duties of the mailroom employees/drivers

The mailroom at the Paterson facility is a large room with a conveyor belt leading from it up through a wall opening into the adjacent pressroom. At the opposite end is a loading dock.

At about 11:15 p.m. each night until February 1981, Peter Trombina and his two foremen (who are apparently referred to as "assistant foremen" in the contract between Respondent News and T & T, discussed in more detail below) reported to the mailroom. They discussed with the circulation manager of Respondent News any changes in locations where newspapers were to be dropped off and other routine matters pertinent to the daily functioning of a newspaper mailroom. At about 11:45 p.m., the mailroom employee/driver reported for work. The pressrun began a few minutes later. It appears that Peter Trombina and his two foremen assigned the mailroom employees/drivers to the various tasks which were required to get the papers from the conveyor belt into the delivery trucks. One of these jobs is referred to as "flying the shute"; it called for an employee to position every 25*th* newspaper on the conveyor belt in such a way that other

employees could easily remove 25 newspapers at a time from the conveyor belt. Still other mailroom employees/drivers tied those separate bundles of newspapers, using machines located in the mailroom. The conveyor belt, the machinery used to tie the bundles and the other equipment used in the mailroom, e.g.,—and trucks, are owned by Respondent News.

Each of the mailroom employees/drivers took the bundles and placed them in wrappers furnished by Respondent News' circulation department; printed on those wrappers were the names and addresses of the retail customers and stop locations. The bundles, so wrapped, were placed in trucks leased by Respondent News from truck rental companies not otherwise involved in this case. No other employees were present in the mailroom when the mailroom employees/drivers were at work there. The trucks they operated carried the newspaper's insignia; there was no insignia on those trucks which showed that T & T was involved in their operation.

The mailroom employees/drivers drove those trucks over long-established routes, of which there were 25 in 1980. These employees dropped the bundles of newspapers at retail stores and at points designated by the circulation manager of Respondent News for pick-up by newsboys making home deliveries. At one point, because newspapers were being stolen, the bundles normally left at stops to be picked up by newsboys, were instead dropped off at the homes of district managers who are employees of Respondent News in its circulation department. Those district managers then brought the bundles to the newsboys for home deliveries. The district managers have driven the delivery trucks and otherwise performed work normally done by mailroom employees/drivers. For example, they service honor boxes, i.e.—newspaper vending machines, and they make collections from retail accounts on behalf of Respondent News. The mailroom employees/drivers had performed that work; their union, NMDU,

had agreed to give it up. However, that agreement is subject to a written guarantee by Respondent News that collection work, honor box work and similar functions will revert to the mailroom employees/drivers before any of them can be laid off.

There is one other area pertaining to the functions of the mailroom employees/drivers which warrants discussion as it sets the background for the events of February 9, 1981, discussed below. That area concerned what the parties have, at various points, termed "topping" bundles. In recent years, major retail concerns have reduced purchases of newspaper space for advertising and, instead, have had advertising circulars printed by outside firms, for ultimate insertion in the newspaper. Those circulars have been delivered in bulk to Respondent News' department. Those circulars are also called at times "inserts" or "supplements". Each time a shipment of circulars was received, Respondent News' circulation manager notified Peter Trombina and several members of the circulation department of the date those circulars were to be distributed. When that day came, maintenance men on the payroll of Respondent News brought the circulars into the mailroom on skids; Peter Trombina showed them where the skids were to be placed for later handling. When the mailroom employees/drivers later removed the newspapers from the conveyor belt 25 at a time as described before, they also placed 25 circulars on top of each set of newspapers. The 25 newspapers, topped by the circulars, were then tied, wrapped and stacked for delivery. That operation is termed "topping" [3] Each time a bulk shipment of circulars was so handled, each mailroom employee/driver

---

[3] The parties were at odds as to the meaning of the work "stuffing" which at times can mean "topping", at other times it can refer to putting the newspapers in wrappers and at still other times, refers to the practice of inserting a circular inside a newspaper. For purposes of clarity, I will use the term "topping", not "stuffing".

was paid $5.00 over his regular daily wage rate. T & T was reimbursed on a cost-plus basis by Respondent News. When the bundles as topped were dropped off at retail stores or to the newsboys, the store owners and the newsboys then inserted the circulars into the newspapers, prior to sale or home delivery.

C. The Contract between Respondent News and T & T; their dealings with NMDU

T & T's relationship with Respondent News is spelled out in detail in their contract, effective from September 1976 to September 1982—the relevant provisions of which are summarized as follows:

1. Respondent News agrees to pay each week a designated amount of money to T & T. That amount approximated $21,000 in late 1980. It was used to pay the wages and fringe benefits to the drivers under the NMDU contract and also to provide Louis and Peter Trombina with earnings of $80,000 a year each. Apparently all of the income received by T & T is so distributed and, under the tax laws, it has no dividends to declare or profits to report. Parenthetically, it should be noted that the monies so earned by Lewis [sic] and Peter Trombina exceed substantially the amounts of the salaries listed on corporate tax returns for the officers of Respondent News, even when it is taken into account that those officers' salaries are not all derived from services rendered by them to Respondent News.

2. Respondent News agrees to pay T & T, in addition to the weekly designated sum, such other increases and costs, compensation of employees, fringe benefits and otherwise which T & T would be required to pay under its contract with the NMDU, including cost of living adjustments as set out in the contract between T & T and the NMDU.

3. T & T agrees to deliver the newspaper published by Respondent News.

4. Respondent News agrees to furnish all trucks to deliver the newspaper and pay for gasoline, oil and all other expenses.

5. T & T agrees to employ and pay wages of 13 men for the morning edition of the paper and 23 men for the evening edition.

6. All such men shall have the necessary wrappers prepared so that when the presses start there will be no delay in getting the bundles tied and placed on the trucks.

7. At the start of the second edition there must be a sufficient number of men left on the floor to complete the day's work without delay. T & T is to have a competent supervisor in the delivery room who shall be satisfactory to Respondent News and who will be on hand until the last truck returns from covering its route.

8. T & T will employ and furnish duly qualified and licensed drivers for the operation of all trucks furnished by Respondent News. T & T must report all accidents to Respondent News within 24 hours. T & T agrees that if and when Respondent News informs it that, in the opinion of Respondent News, a driver is not a qualified safe driver, T & T agrees to replace that driver with another driver acceptable to Respondent News.

9. T & T will wrap mail subscriptions and transport them to the post office no later than 5:00 p.m. daily.

10. T & T will deliver all papers to wherever Respondent News directs within a distance of 50 miles of the plant in Paterson.

11. In the event a driver exceeds a normal day's work because of hardship, Respondent News will pay the necessary compensation.

12. Respondent News agrees that there will be no layoffs of any drivers in T & T's employ.

13. T & T shall obtain a comprehensive insurance policy to protect Respondent News. T & T agrees to provide workmen's comprehensive insurance for its drivers and to furnish Respondent News with proof thereof.

14. T & T agrees to have a signed contract with NMDU to insure uninterrupted delivery service. T & T shall prepare and maintain in the circulation office of Respondent News a complete and proper bookkeeping system.

15. All assistant foremen of T & T must be approved by Respondent News.

16. T & T is responsible to Respondent News for any shortages of missing newspaper bundles.

17. Respondent News at its own cost and expense shall furnish T & T with all necessary wrappers.

18. T & T will furnish at its own cost and expense ledgers and any other items to properly keep a bookkeeping system.

19. All route schedules are to be made out by Respondent News and cannot be changed without its permission.

20. All deliveries of the morning edition must be completed before 6:00 a.m. and all deliveries for the afternoon edition must be completed prior to 4:00 p.m.

As the agreement between Respondent News and T & T required Respondent News to reimburse T & T for any

additional expenses incurred by T & T by reason of the provisions of any collective bargaining agreement between T & T and the NMDU, it was customary for Peter Trombina to keep the officials of Respondent News informed as to NMDU's negotiating demands. The chapel chairman of the mailroom employees/drivers negotiated with T & T vice-president Peter Trombina as to those demands. Peter Trombina testified that he always reviewed those demands with representatives of Respondent News and relayed their views to the NMDU. He testified also that, prior to the purchase of Respondent News by Respondent Allbritton in 1977, he and officials of Respondent News considered which of the NMDU demands were "strike subjects", i.e.—those about which the NMDU would strike to obtain. The former owners of Respondent News (one of whom is now the publisher of Respondent Dispatch) testified for Respondent in substance that Respondent News never got involved in the NMDU negotiations. The General Counsel placed in evidence, to rebut that assertion, a letter dated March 29, 1976 from the president of T & T to one of the former owners listing seven NMDU contract demands and 13 Local demands by the T & T chapel chairman. I credit Trombina's testimony as the documentary evidence received at the hearing corroborates his account. In practice, it appears that the NMDU and Respondent News routinely accepted the wage and fringe package negotiated between the NMDU and the major New York City newspapers.

When T & T concluded its negotiations with the NMDU, the weekly payment to be made to T & T would be increased by a certain sum. On one occasion, Respondent News questioned that figure; T & T thereupon reduced it, to an amount acceptable to Respondent News. On occasion, Respondent News had asked T & T to furnish it with a detailed breakdown of the costs contained in that figure. T & T's response in essence was that it was not obligated to do so under its contract with Respondent News. In that regard, it is noted that the first contract negotiated

between T & T and Respondent News in 1964 provided that T & T would furnish Respondent News such a breakdown upon request. However, Respondent News did not insist upon such a provision in succeeding contracts.

The NMDU steward of the mailroom employees/drivers in this case testified that the only grievances that the NMDU ever pursued were those that could be resolved only by Respondent News. One of those grievances had to do with the fact that on one occasion pipes in the mailroom where leaking; as the owner of the building, Respondent News of course was the party who could and did correct that situation. Another grievance pursued by the NMDU had to do with the condition of the delivery trucks. As noted earlier, those trucks were furnished by Respondent News and thus only Respondent News could effectively satisfy that grievance. As discussed in greater detail below, a critical dispute developed when Respondent took the initiative in pressing T & T to obtain agreement from NMDU to the proposals of Respondent News to reduce the number of delivery routes from 25 to 14 with a consequent reduction in the number of drivers from about 36 to about 18.

The General Counsel offered uncontroverted evidence that, shortly after Respondent Allbritton purchased the assets of Respondent News, Dean Singleton, the executive vice president of Respondent Allbritton had occasion to write a departmental memorandum to the T & T drivers during which he and Respondent News' circulation manager expressed their appreciation for the work being done by those drivers. On another occasion, Singleton had a meeting with those drivers, in the course which he told them that they and all the other people working at the Paterson facility were part of "the same team".

In 1974, Respondent News wrote T & T to demand that a driver be discharged for having operated its truck while under the influence of narcotics and T & T discharged that driver.

D. Rspondent News' efforts in 1980 to reduce the number of routes and of mailroom employees/drivers

Respondent News had, for some years prior to its being purchased by Respondent Allbritton in 1977, lost a great deal of money. In 1980, it continued to suffer operating losses and Respondent Allbritton lent it a considerable amount of money.

On April 30, 1980 Respondent's attorney at that time wrote the NMDU to request a meeting to discuss the drastic changes it said it had to make because of its operating losses. NMDU's counsel responded by letter of May 2, 1980 that it would not be appropriate for NMDU to circumvent T & T, with whom it has a contract.

At about that time, rumors began to circulate that Respondent News, which then published a morning edition and an afternoon edition of *The News*, would discontinue the afternoon edition. The NMDU secured a "restraining order" as provided for in its contract with T & T whereby T & T was directed not to change the *status quo*. Trombina informed Respondent News of the provisions of the restraining order. On June 9, 1980, Respondent News discontinued the afternoon edition. The NMDU then ordered the mailroom employees/drivers not to handle the morning edition as it considered that the procedures followed by Respondent, insofar as they affected the employees represented by the NMDU, were in violation of the restraining order the NMDU had secured. The president of Respondent News then asked Trombina to try to get the NMDU to accept Respondent News' plan to have but one press run during which the morning and afternoon editions were to be printed. Agreement was reached whereby 3 employees were to be hired by Trombina, placed on T & T's payroll, and assigned to the job of stacking the afternoon edition for later handling and delivery by the mailroom employees/drivers. Previously, the mailroom employees/drivers had handled the removal of papers from

the conveyor belt and performed related duties during the second press run.

In August 1980 Respondent's official, Dean Singleton, told Trombina that at least 18 mailroom employees/drivers would have to be laid off. Trombina met with Respondent News' circulation manager and also with a consultant engaged by Respondent to plan new route schedules. They worked out 12 proposed routes instead of the existing 25, and thereby hoped to reduce the number of mailroom employees/drivers from 36 to 14. Respondent News and T & T then undertook the matter of following formal procedures towards getting relief from the expenses of the NMDU contract.

On October 2, 1980, Respondent entered into an agreement with T & T whereby it continued in effect the contract that it had executed with T & T on September 17, 1976. In addition, T & T agreed on October 2, 1980 that it would immediately apply for, on behalf of Respondent, the maximum possible reduction of manpower with respect to the mailroom employees/drivers under the NMDU contract then in force. Respondent agreed to reimburse T & T for all contractual severance pay for any mailroom employee/driver laid off, and to be responsible for all legal fees incurred by T & T in furtherance of the effort to obtain the manpower reduction. Respondent further agreed to the responsible for all fees and expenses related to any arbitration proceeding necessary to accomplish that end. It wound up paying a $25,000 legal fee to the attorney used by T & T in the arbitration proceeding, discussed below. In the October 2, 1980 letter of agreement, Respondent also assured T & T that its profit would remain unchanged and that its payments to T & T will be reduced "only by the cost of the drivers laid off."

T & T then met with the NMDU and conveyed to it the desire of Respondent to reduce the number of the routes from 25 to 12 and the related number of mailroom

employees/drivers reduced from 36 to about 14. NMDU resisted and T & T sought arbitration. The attorney for T & T met with representatives of Respondent to discuss prospective arbitration proceedings. They reviewed the qualifications of the individuals in the group from which the arbitrator was to be selected and discussed tactics and arguments to be used at arbitration hearing. The arbitration proceeding was held on November 27, 1980 and on January 7, 1981 in New York City. On the second and last day of that hearing, the publisher of Respondent News, John Buzzetta, was present and he supplied the T & T attorney with financial records in order to enable T & T to argue that there was a sound economic basis for the number of routes to be reduced. However, Buzzetta refused to testify thereon and the arbitrator declined to consider the financial documents on the ground that there was no foundation for the receipt of those documents into evidence. On January 11, 1981 the arbitrator issued his award, finding that T & T could lay off only 5 drivers. Trombina testified that he was with Dean Singleton, executive vice president of Respondent Allbritton, at about that time and Singleton asked him if he had heard anything further about the arbitration. According to Trombina, he then telephoned his attorney who informed him of the results of the award. Trombina testified that he then told Singleton of the award and that Singleton looked annoyed and took the phone from him. When the call ended, according to Trombina, he asked Singleton if he wanted a copy of the award and Singleton told him that he could take the copy of the award "and stick it up (his) ass or burn it".

The General Counsel called three witnesses to testify respecting conversations they asserted they had with Dean Singleton at about the time that award issued.

James Sherlock, president of the Pressmen's local which represented pressmen employed by Respondent News and who had also been employed by it until his layoff in mid-

1980, testified as follows. He talked with Singleton in mid-January 1981 about the above arbitration award. Singleton told him that he, Singleton, could not live with that award, that he would "take the drivers on" and that "they'll be out in the street hollering for about a year."

James Garvey, president of the Pressmen's local at Respondent Dispatch, testified that Singleton, as a negotiating session, asked him what would the drivers who deliver the *Dispatch* do if there was any trouble in Paterson in the mailroom.

Peter Gambatese, a mailroom employee/driver at Paterson testified that in mid-January 1981 he had a discussion with Singleton in the lobby of the building in Paterson, during which Singleton told him that Trombina and the drivers would be out of the building in three weeks, that that was the way things are done in Texas and that is the way they would be done in Paterson.

Singleton did not controvert the accounts of Sherlock and Garvey. I credit those accounts. Singleton, however, testified that the discussion he had with Gambatese in the lobby, had to do with an effort by Gambatese to arrange a meeting between Singleton and the NMDU which Singleton said he rejected because Respondent had no dispute with the NMDU. I credit Gambatese's account as the remarks he attributed to Singleton were essentially restatements of the uncontroverted credited testimony of Sherlock and Garvey, and as Gambatese's account was borne out, i.e.—Trombina was put out of the building by formal notice in late January, as discussed below.

On January 14, 1981 Respondent wrote T & T that it would have to move its office out of Respondent News' building.

In the latter part of January 1981, T & T's corporate office was relocated. Peter Trombina continued to report to the mailroom as did his two foremen and the mail-

room employees/drivers. Trombina received a notice, as was customary, that in early February 1981 an advertising supplement would go out with the newspaper on February 10, 1981. He had, however, no advance information that February 9, 1981 would be any different from any other evening's work.

About this same time, the collective bargaining agreements Respondent News had respectively with Local 103 for the composing room employees and with a Pressman's local for the pressroom employees were on the verge of expiring. Prospects were dim then that they would be renewed amicably.

The Local 103 chapel chairman for the composing room employees testified without contradiction that, in about the first week of February 1981, he asked one of Respondent's supervisors, Fred Temby, why Respondent was parading armed guards through the building and that Temby told him that Respondent "intends to get rid of the mailer drivers no matter what the courts say or what happens in court . . ." One of Respondent News' reporters testified that, shortly after the picketing began as described below, he overheard Singleton and Buzzetta joking about "how the union (was) outside" and he told them that the legal proceedings were far from over. Singleton answered that Respondent would "appeal to the Supreme Court if necessary to keep the union outside."

E. The alleged lockout on February 9, 1981

Trombina arrived at the mailroom about 11:15 p.m. on February 9, one-half hour before his crew was due to arrive and about three-fourths of an hour before the press run was scheduled to start. He found 25 strangers in the mailroom who were removing newspapers from the conveyor belt. The pressrun had started an hour earlier. Trombina had not been told of that. The 25 strangers were inserting advertising circulars in the

newspapers. Trombina had not received the customary advance notice that circulars would be distributed with the newspaper on February 9. Trombina saw Singleton there, together with the publisher of Respondent News (John Buzzetta), its former publisher (Harry Haines) and an individual later identified as Respondent's labor attorney. Trombina asked Haines what was going on and was told that he, Haines, could not say as it was too early. NMDU officials arrived at about the same time the mailroom employees/drivers arrived to report for work. The NMDU officials voiced their objection to the fact that the 25 strangers were working on the conveyor belt. Respondent's circulation manager directed Trombina to let the strangers handle the newspaper. Trombina protested that Respondent was forcing him to violate his contract with NMDU. Buzzetta ordered the strangers to continue to handle the newspapers. At about that point, a sergeant of the Paterson police sought to mediate the discussion. After caucuses and other confrontations, Buzzetta ordered Trombina and the mailroom employees/drivers out of the mailroom. He asserted that the NMDU officials had engaged in physical coercion. I find that their acts were little more than symbolic, i.e., placing their hands on the newspapers and holding onto the newspapers when one of the strangers sought to take those newspapers off the conveyor belt. It is unlikely, in my view, that the confrontation got out of hand, from a physical aspect, inasmuch as the Paterson police were present and had the situation well under control.

The mailroom employees/drivers left the building and set up a NMDU picket line outside the building at about 12:30 a.m. on February 10, 1980.

At least one of the "strangers" present on the night of February 9 turned up as a guard at the premises of Respondent News on the following day. He then wore a uniform with a "Boyd Security" label. Respondent's offi-

cial, Buzzetta, testified that Respondent had obtained about 12 drivers from Boyd Security two weeks previously, that it had taught them the routes used by T & T. The General Counsel offered uncontroverted evidence which established that the "strangers" in the mailroom on the night of February 9 drove the delivery trucks later that night, that a week or two later a number of those "strangers" performed guard duty for Boyd Security at the Paterson facility of Respondent News, that at about February 18, 1981 a new crew of mailroom employee/drivers began working in the mailroom and that Respondent paid that crew $35,000 in cash each week and also paid their hotel expenses.

Peter Trombina testified without contradiction that there were about five nights from February 9 to April 1, 1981 when circulars were delivered to the mailroom for insertion into the newspaper and that, on three of those nights, those circulars were tied on top of the newspapers, as had been done prior to February 9 and, on the other two nights, the circulars were inserted into the newspapers prior to handling.

Trombina further testified without contradiction that in 1978 the publisher of Respondent News asked him to get NMDU's position as to whether it would object to the use by Respondent News' of non-union employees to do insert work in the mailroom. Trombina testified that the NMDU chapel chairman told him then that there was "no way" the NMDU would let others do their work. He, Trombina, then reported that response to the then publisher of Respondent News and was told that no changes would be made as to the "topping" procedures.

Evidence was adduced respecting the delivery procedures used by Respondent Dispatch at its facility in Union City, about 12 miles from Paterson. There, a "wholesaler", Hudson County News Company, picks up the newspaper bundles and delivers them along with other

newspapers, using its own trucks which operate on routes it has set up. Respondent Dispatch has agreed to "subsidize" any wage increases Hudson News must pay as required under its NMDU contract but Respondent Dispatch does not guarantee that Hudson County News will enjoy a "profit".

F. The proceedings in the U.S. District Court for the District of New Jersey; the alleged refusal to reinstate the NMDU strikers

Respondent News sought an injunction in the Superior Court of New Jersey against alleged picket line misconduct by the NMDU. That matter was removed to the U.S. District Court for the District of New Jersey. NMDU filed a counterclaim alleging that Respondent News, as a joint employer with T & T of the mailroom employees/drivers, had locked out those employees in violation of the provisions of the NMDU contract. Respondent News withdrew its complaint and moved for dismissal of the counterclaim on the grounds that it was not a joint employer of the mailroom employees/drivers so that the Court had no jurisdiction to hear the contract claim.

On February 13, 1981 Peter Trombina testified at length in that proceeding, conducted before Honorable H. Lee Sarokin, U.S.D.C. judge. Judge Sarokin issued a TRO that day directing Respondent not to prevent the mailroom employees/drivers from working in the mailroom. Judge Sarokin noted, *inter alia*, that the "real cause of the lockout" was Respondent's use of 25 persons as inserters.

When the mailroom employees/drivers arrived at the Paterson facility shortly before midnight on February 13 in order to enter the mailroom, they found that Local 103 had set up a picket line of composing room employees. The mailroom employees/drivers honored the Local 103

picket line, just as the composing room employees had honored the NMDU picket line on February 10. The basis for the Local 103 picket line is discussed elsewhere in their decision.

The trial before Judge Sarokin was adjourned on February 13. On February 26, prior to its resumption, NMDU's president, Schwartz, attended a meeting with Dean Singleton of Respondent at which other representatives of NMDU were present, along with officials of the Pressmen's union. Singleton testified before me that Schwartz told him at that meeting that Respondent was not the employer of the mailroom employees/drivers. Schwartz denied making any such statement. I credit Schwartz' denial as it is most unlikely that he would make such a statement to Singleton when NMDU was vigorously urging to Judge Sarokin that Respondent was a joint employer of those very employees.

The case before Judge Sarokin resumed on March 12, 1981. Counsel for Respondent urged then that Respondent should be relieved of the restraints imposed by the TRO that had issued on February 13. He argued that the circumstances existing on February 13 had been materially altered by the Local 103 strike and particularly by the fact that the mailroom employees/drivers were honoring the Local 103 picket line. Testimony was adduced before Judge Sarokin on March 12 and again on March 13 from Respondent's officials, including Singleton, Buzzetta, and its circulation manager, Monaghan. Judge Sarokin recessed the trial and it resumed on May 7, 1981. On that day, he read his opinion into the record. He recited his findings of fact as to the corporate structures, the absence of common ownership, the provisions of the contract between Respondent and T & T (he noted that it was a "cost plus contract") the daily contacts the mailroom employees/drivers had with employees on Respondent's payroll in connection with the delivery operations, the involvement of Respondent in the arbitra-

tion case and other aspects of the testimony presented to him. He then reviewed the procedural history of the case before him and observed that federal courts have, under 29 USC Sec. 185, jurisdiction of a violation of a collective bargaining agreement, and that he would have jurisdiction only if Respondent were held to be a joint employer with T & T, the party to the NMDU contract. Judge Sarokin then set out his analysis as conclusions of law. He reviewed applicable Board decisions and Court cases and determined that the essential facts paralleled those in *Pulitzer Publishing Company* v. *NLRB*, 618 F.2d (8 Cir. 1980) and those in *Russom v. Sears, Roebuck & Company*, 558 F.2d 439 (8 Cir. 1977), cert. den. 443 U.S. 995 (1979). His opinion relates that he applied the criteria in the cases he reviewed and in other cases he cited, including Board decisions and he concluded that there is no joint employer relationship between Respondent and T & T. In so concluding, he noted:

> The News has no ownership interest in T & T. There are no common directors or officers. Bank accounts and books are kept and were kept separately and there is no movement of money indicating financial dependence or control other than the debt obligations incurred in the normal course of business arising out of the contract between the parties. No personnel of the News negotiates with the union, meet with union officials or are involved in labor relations.
>
> T & T hires, fires, and handles all personnel problems and grievances with a minor provisions already set forth in respect to the contract: recognizing that the trucks used by T & T are leased by the News, nevertheless T & T pays its own general liability insurance, Workers Compensation Insurance and other business insurance.

T & T pays the drivers on its own checks and takes out withholding and remits that to the appropriate agency. T & T is responsible for the direction of its drivers and assignments of particular routes, although the routes are determined by the News.

T & T has input into their determination. A letter from the union corporate counsel indicates that the union recognizes T & T and not the News as the party to its contract; Exhibit P-2.

Regarding discussions between the News and T & T, the union counsel noted that, "Only if those discussions directly affect contractual obligations of the wholesaler"—T & T in this case—"would the union become involved, and in that event its discussions would be limited to the wholesaler."

Based upon the foregoing findings of fact and conclusions of law the Court concludes that T & T and the News do not have a joint employer relationship, and therefore, the Court lacks jurisdiction on that basis.

Judge Sarokin then considered whether or not he had jurisdiction to decide the second claim advanced by NMDU against Respondent based on asserted tortious interference by it with the contractual relationship between NMDU and T & T. Counsel for Respondent then stated, as to that point, that "the National Labor Relations Act is the statutory forum of original jurisdiction on Section 7 rights" and he contended that it would thus be unjust to continue in effect the restraining order against Respondent that had previously issued. Judge Sarokin then noted that the circumstances before him at that time were substantially different from those which first prompted the issuance of the restraining order. He pointed out that, when he first got the case, the NMDU employees had been in effect locked out by Respondent

but that later the NMDU elected not to cross another union's picket line. He dissolved the restraint with a warning to all that "whatever they do they do so at their own peril" and that "if there is any change in the circumstances; such as . . . a desire . . . of (NMDU) members . . . to get . . . back to work", an application can then be made to him "or the Board." He observed that he would leave that decision "to the experts in the field." Judge Sarokin then addressed himself to procedural matters and recessed the hearing.

On May 15, 1981, during the recess period, NMDU applied to Respondent on behalf of the mailroom employees/drivers for unconditional reinstatement to their former jobs. Respondent rejected the offer on the ground that it did not employ the mailroom employees/drivers. NMDU repeated that offer to Respondent later in the year and it was rejected again on the ground that Respondent was not the employer of the mailroom employees/drivers.

The case that Judge Sarokin had been hearing was transferred to Honorable Herbert J. Stern who ruled on July 7, 1981 that Judge Sarokin's decision on the joint-employer issue had disposed of the Section 301 claim and that, as the matter no longer involved a federal question, the remaining counterclaim, pertaining to a tort issue, was cognizable under state law. He vacated the order whereby the civil action originally filed in the Superior Court of New Jersey had been transferred to the U.S. District Court, as related above. Judge Stern observed on July 7 that, as the U.S. District Court had no jurisdiction of the subject matter "everything is void, nothing can be done. It is all wiped away like a wet cloth going over a blackboard" and that "everything . . . done (in the federal court) is (a) total nullity."

Subsequent NMDU filed an original complaint in the United States District Court for the District of New Jersey (Civil No. 81-2423) in which it named T & T as

defendant—and in which Respondent was named as third party defendant. On October 2, 1981 Judge Stern asked the NMDU's counsel in a session before him how he could have jurisdiction over Respondent in view of Judge Sarokin's determination that it was not a joint employer with T & T. Counsel for NMDU responded that the definition of "employer" under the Act is very broad and he noted that the regional office of the Board had issued a complaint (apparently a reference to the administrative complaint that later came before me) on alternative theories—joint employer and principal-agent. Judge Stern asked for briefs on that aspect and also as to whether, he could or should hold the case in abeyance until the Board "has acted."

On November 9, 1981 Judge Stern advised the parties that he would stay the proceedings before him "until further action by the N.L.R.B."

G. Analysis

In their respective briefs, the General Counsel and Respondent note that, in determining whether two or more employers "possess sufficient control over the work of employees" to be considered a joint employer, an essentially factual issue is presented.[4] Respondent contends that the General Counsel is collaterally estoppel from arguing that Respondent is a joint employer with T & T of the mailroom employees/drivers as Judge Sarokin found on May 7, 1981, that it was not[5] and as the

---

[4] *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 481 (1964).

[5] Respondent cited *N.L.R.B.* v. *Walter E. Heyman*, d/b/a *Stanwood Thriftmart*, 541 F.2d 796 (Cir., 1976) in support of that proposition. I would be bound however, by the underlying decision of the Board in that case, reported at 216 NLRB 852. The holding there was on the merits of a purely legal issue, as to whether an unfair labor practice was committed. That is clearly a matter as to which the Board has primary jurisdiction. See *Kaiser Steel Corporation*

Sec. 301 counterclaim was then discussed. After that case was transferred to Judge Stern, he vacated the removal order so that the remaining tort claim, apparently cognizable under state law, could be returned to the Superior Court of New Jersey. Later, NMDU instituted a suit against T & T under Sec. 301 and named Respondent as third party defendant. Judge Stern closely questioned the parties as to why Judge Sarokin's determination as to the joint-employer question should not stand as the "law of the case" insofar as the status of Respondent as third-party defendant was concerned. There was extensive discussion on that point. Judge Stern deferred his ruling indefinitely and observed that, as Judge Sarokin determined that he had no jurisdiction under Sec. 301, his determination in that proceeding was a "nullity." In General Counsel's brief, that observation of Judge Stern is set forth, together with a note that the record made before Judge Sarokin was incomplete and, on some points, inexact.

The issue raised by Respondent as to the applicability of the principle of collateral estoppel has been said to be one which pertains to "an area of conflict under Federal labor policy which has yet to be clarified." [6]

NMDU had contended, in its counterclaim, before Judge Sarokin, that the employees it represented were locked out by Respondent in violation of the express language of the contract NMDU had with T & T and Respondent News, as a joint employer. Notwithstanding that that claim, as fully explicated by the NMDU, is one that would constitute an unfair labor practice, the Board's jurisdiction does not displace that of the Court

---

v. *Mullen et al*, —— U.S. ——, 102 S. Ct. 851, 109 LRRM 2268 (1982). The question before me now, the joint-employer question, is a *factual* issue. Heyman is inapposite.

[6] *Newport News Shipbuilding and Dry Dock Company*, 253 NLRB 721, 726-7 (1980).

to adjudicate a contract claim under Sec. 301.[7] Yet, the power of the federal courts to enforce the terms of private agreements "is at all times exercised subject to the restrictions and limitations of the public policy as manifested in . . . federal statutes . . ."[8] The Board has primary jurisdiction to determine what is or what is not an unfair labor practice.[9]

Very recently, the Board had occasion to consider whether a determination in a related federal court suit precluded the Board, under the principles of *res judicata* or collateral estoppel, from determining the merits of a case.[10] At first reading, the Board's decision in that case would appear to require me to reject Respondent's contention that the General Counsel is barred, under the doctrine of collateral estoppel, from urging that Respondent and T & T are a joint employer in view of Judge Sarokin's finding. Thus, in *Penntech Papers*, the Board noted that it was not precluded, by the determination in a related Section 301 action, and the principles of *res judicata* or collateral estoppel, from finding that the three companies named as respondents in that case were a single employer. An analysis of that decision, however, discloses that the Board may well apply the doctrine of collateral estoppel in the instant case. A brief discussion of the procedural history of the *Penntech Papers* case is warranted to put the Board's holding in proper focus. In that case there were three named respondents—Kennebec Paper Mill, TP, and Penntech Papers.

Kennebec Paper Mill had a contract with the Paperworkers' Union. Penntech, through its subsidiary TP,

---

[7] *Smith* v. *Evening News Association*, 371 U.S. 195 (1962).

[8] *Hurd et al* v. *Hodge et al*, 334 U.S. 24, 34-35 (1948), quoted in *Kaiser Steel Corp.* v. *Mullins, supra.*

[9] *Kaiser Steel Corporation* v. *Mullins, et al, supra.*

[10] *Penntech Papers, Inc.*; *T.P. Property Corporation and Kennebec River Pulp and Paper Company*, 263 NLRB No. 33 (1982).

bought Kennebec Paper Mill. The paper mill closed down and the union there sued all three companies under Section 301 of the Act to compel them to arbitrate "certain provisions" of its contract with Kennebec Paper Mill. Penntech Papers sought dismissal of that suit on the grounds that it was not a signatory to that contract. The U.S. District Court found that the three companies were *alter egos* of each other.[11] However, it held that, under applicable principles of state law encompassed in the federal common labor law,[12] the corporate veil should not be pierced to require Penntech Papers to arbitrate.

The Papersworkers Union had also filed an unfair labor practice charge against Penntech Papers, TP and Kennebec Paper Mill. The complaint which issued alleged that they, as a single employer, had violated Section 8(a)(5) of the Act by having failed to bargain as to the effects of closing the paper mill. Penntech contended that, under the principles of *res judicata* or collateral estoppel, the Board was precluded from finding that it was a single employer with Kennebec Paper Mill. I fail to see how it could seriously raise that issue in view of the finding of the U.S. District Court that they were *alter egos* and the observation of the U.S. Court of Appeals that Penntech Papers, TP and Kennebec Paper Mill "were so intertwined as to be most indistinguishable." In any event, the Board rejected Penntech's contention on the grounds that the cause of action and the respective issues involved lacked identity. Significantly for my purposes, the Board also observed that the U.S. District Court did not examine into the usual criteria used to determine whether "several nominally separate

---

[11] *United Paperworkers International Union et al* v. *Penntech Papers Inc., et al* v. *Penntech Papers Inc., et al*, 439 F. Supp. 610 (U.S.D.C., Dt. of Me. 1977), 96 LRRM 2910 aff'd 583 F.2d 22 (1 ir 1978).

[12] The Court discussed *John Wiley & Sons* v. *Livingston*, 376 U.S. 543 (1964) and progeny.

business enterprises (constitute) a single employer", referring to the "controlling criteria, . . . interrelation of operations, common management, centralized control of labor relations and common ownership." That same observation could not be made of Judge Sarokin's determination, in the related Section 301 suit involving NMDU, T & T and Respondent, that Respondent was not a joint employer with T & T. Judge Sarokin reviewed Board decisions and Court cases which considered the relevant criteria in determining the joint employer question. His determination thereon went to the very jurisdiction of his Court. That determination was reached after days of testimony, extensive arguments, and briefs. There seems to be no valid reason why preclusive effect should not be given to it.[13] The fact that I personally disagree, as discussed below, with that finding is not a sufficient reason to ignore the principle of collateral estoppel. Rather, it is all the more reason for following that principle as it is aimed at avoiding contradictory results. I find it controlling.

The General Counsel has urged a separate legal theory on which it is contended that Respondent violated the

---

[13] I recognize that Judge Sarokin and Judge Stern subsequently made comments suggesting that the Board may have primary jurisdiction in this area. Primary jurisdiction pertains to conflicting legal principles, not findings of fact. As noted earlier, the U.S. Supreme Court has held the joint-employer issue is a factual one. Yet, the Board may want to consider whether the concept of primary jurisdiction would apply to a determination as to what constitutes a joint-employer under the Act. The factors relevant to that determination, or the emphasis given to certain of them, suggest that the concept of joint-employer is different under the Act then in other areas of law. Thus, in a tort suit, Respondent may well be held liable for the negligence of a mailroom employee/driver on T & T's payroll when making a delivery of newspapers even though, as Judge Sarokin found, Respondent is not the employer of these employees under Sec. 301 of the Act. While the Board is free to explore whether or not it has primary jurisdiction to decide that issue, I am bound by principles already set—in this case, collateral estoppel.

Act by locking out the mailroom employees/drivers on February 9, 1981. The General Counsel asserts that T & T was the agent of Respondent such that when NMDU dealt with T & T, it was in reality dealing through T & T with its principal, i.e.—Respondent. However, the authority relied on by the General Counsel rests upon the concept of *respondeat superior* whereby a principal was held liable for the wrong of the agent when done in the course of the agency.[14] No one is suggesting that T & T violated the Act in its dealings with the NMDU. The principal-agent theory has no relevance to the issues in this case or is but a strained effort to re-submit for consideration the determination made by Judge Sarokin as to the merits of the joint-employer question.[15]

In the event the Board finds, upon appropriate exceptions, that the principle of collateral estoppel should not be applied in this case, the following is submitted for its further consideration. I would find that Respondent and T & T were joint employers of the mailroom employees/drivers as there was a most significant interrelation of operations between them and as Respondent's control of working conditions inevitably involved it in labor relations matters affecting those employees.[16] All of the

---

[14] *Mason City Dressed Beef, Inc., and Packing House* and *Industrial Services, Inc.*, 231 NLRB 735 (1977).

[15] Judge Stern had made that same observation on July 7, 1981. His later statement that the finding that his court lacked jurisdiction rendered the preceedings before him a "nullity" obviously did not negate the factual basis upon which that determination was predicated.

[16] *B.F. Goodrich Company and Industrial Personal Corporation* 250 NLRB 1139, enf. 657 F.2d 226 (8 Cir. 1981). *The Pulitzer Publishing Company*, 242 NLRB 35 (1979), enf. den. 618 F.2d 1275 (8 Cir. 1980). Incidentally, the Eighth Circuit, in *Goodrich* distinguished *Pulitzer* and the distinctions it drew are applicable to the facts in the instant case, See also *Floyd Epperson and United Dairy Farmers, Inc.*, 202 NLRB 23 (1973) and *U.S. Pipe & Foundry Company and Winfrey Enterprises, Inc.*, 247 NLRB 139 (1980).

following factors and others, to my mind, compel a finding that Respondent and T & T were joint employers of those employees—Respondent undertook a concerted effort to lay 18 of them off and paid a $25,000 legal fee as part of that effort; it unilaterally changed long-established work rules to have an excuse to lock out those employees; the mailroom employees/drivers worked in Respondent's building, used its machinery to place the bundles in wrappers it furnished, drove its truck with its logo on them to carry its newspapers to locations designated on Respondent's galleys on routes set by Respondent for delivery at times regulated by Respondent; Respondent resolved the only grievances filed by those employees; Respondent told them they were part of the "same team". I would not place as much weight on the differences in the corporate structures and the related differences in their respective internal auditing procedures as those factors are not essential.[17]

Respondent asserts, in the alternative, that even were it a joint employer, it did not violate the Act by assigning the inserting work to the 25 "strangers" on February 9, 1981 or by locking out the mailroom employees/drivers that night or by having permanently replaced them "before they made an unconditional offer to return to work". These alternative arguments are premised on assertions which are either factually inaccurate or based only on hypothesis. They overlook the obvious, that Respondent intentionally set about the task of creating a confrontation with the NMDU on February 9 and prepared itself that night by having present not only its executives but also its labor counsel and by having spent the preceding two weeks paying for and training replacements for the mailroom employees/drivers. In that context and in view of the long-established "topping" procedures followed in the mailroom with respect to the circulars, I would have a great deal of trouble finding

---

[17] *U.S. Pipe & Foundry etc., supra* at p. 141.

merit to Respondent's claim that no change in work assignments occurred that night. I would have equal difficulty in accepting its arguments that there was no lockout or that if there was, NMDU was responsible for it or that, if Respondent had conceded that it was the employer of the mailroom employees/drivers, it would still not have reinstated any of them as it likely would have asserted then that it had lawfully hired permanent replacements. Much more to the point, it seems clear to me that, were Respondent the employer, it evidenced on and since February 9, 1981 a total repudiation of that relationship as to the mailroom employees/drivers and their bargaining agent, NMDU. In that view, its actions established that it thereby withdrew recognition from NMDU and discharged those employees. I would attach little significance to the fact that it was prepared to comply with the TRO Judge Sarokin issued. At best, that consideration would be one to be weighed in a back-pay proceeding. In sum, were it not for my finding above as to the application in this case of the principle of collateral estoppel, I would find that Respondent violated Sec. 8(a)(1), (3) and (5) as alleged in the amended complaint, insofar as the mailroom employees/drivers are concerned.[18]

IV. The Editorial Employees

A. The relevant pleadings

The complaint in this case alleges, and Respondent's answer denies, that the editorial employees employed by Respondent News and Respondent Dispatch comprise an appropriate unit; that on about October 22, 1980 a majority of those employees had selected Local 103 to represent them for purposes of collective bargaining; that in

---

[18] *N.L.R.B. v. Katz*, 369 U.S. 736 (1962); *Sun-Maid Growers of California*, 239 N.L.R.B. 346 (1978) enf. 618 F.2d 56 (9 Cir., 1980) *SYOFU Enterprises, A Limited Partnership*, 220 NLRB 738 (1978).

October 1980 Respondent's agents (admitted supervisors Laciura and Laura) had warned and threatened these employees to discourage their activities on behalf of Local 103; that Respondent had discharged and has failed to reinstate eight named editorial employees in October 1980 because of their activities on behalf of Local 103; that Respondent discharged another employee, Dale Rim, on February 21, 1981 because he refused to perform struck work; and that Respondent had discharged a tenth editorial department employee, Charles Macaluso, on February 27, 1981 because of his activities on behalf of Local 103 and because he had given testimony under the Act. The complaint further alleges, and Respondent's answer denies, that on October 22, Local 103 requested Respondent to recognize it as bargaining agent of these employees; that Respondent's unlawful conduct precluded the holding of a fair election; and that, since October 24, 1980, Respondent has unlawfully failed to bargain with Local 103 as the exclusive representative of the employees in the editorial unit.

B. Background and Local 103's organizing activities

Local 103 had represented the composing room employees of Respondent since about 1965 but had made no effort to organize the editorial department employees of Respondent until early 1980. Several editorial employees signed Local 103 cards then.

During the latter part of August 1980, a significant number of editorial department employees indicated support for Local 103. Nine editorial department employees signed Local 103 cards in late August 1980; seven more signed in September and nineteen in October 1980.

C. Alleged warnings and threats

In September 1980, according to the uncontroverted account of editorial employee David Stieffel, he and sev-

eral other reporters were at work talking among themselves about signing authorization cards for Local 103 when the associate editor for Respondent News and an admitted supervisor, Phil Laciura, told him not to talk so loud and to stop talking about "that kind of thing."

The composing room chapel chairman for Local 103, Joseph Alessi, testified without contradiction that, sometime before the layoff on October 24, 1980 (discussed below), Laciura told him, when he was getting Local 103 authorization cards signed by editorial employees, that he should be doing that more discretely and asked Alessi what was going to happen when someone loses his job.

One of the editorial department employees, Jeff Kisseloff, testified without contradiction that in mid-October 1980, admitted supervisor, city editor Joseph Laura, discussed with him a problem that he, Laura, had with another employee. In that discussion, Laura referred to Local 103 and told Kisseloff that he wanted him to tell the other reporters that he was not against Local 103 but that his managing editor, David Smith, and executive editor, Richard Vezza, were against Local 103 and were calling him on the phone everyday asking what employees should be discharged in order to block Local 103. Laura told Kisseloff also that managing editor Smith had been very upset with the fact that Kisseloff had phone conversations with coworker Jack Fischer; Laura quoted Smith as having said that Kisseloff and Fischer must be talking about "the union" and that he wanted him, to warn people like Fischer, McDonnell, Duhl, and Chang that he would fire them if he had to as he did not want anyone to get in his way. Kisseloff related that Laura told him further that Smith did not want Local 103 because he felt that it would be a threat to his control. Laura did not testify at the hearing. Neither did Laciura nor Smith. Executive editor Vezza did testify. He did not refer directly to the substance of Laura's remarks, as recounted by Kisseloff. He did testify that, after

Local 103 filed a petition for an election, as discussed below, he talked in general terms about that petition during informal discussions among some of the editors. In its brief, Respondent has urged that Kisseloff's testimony should be discredited on the ground that it is replete with assertions of memory lapses and with internal inconsistencies. I do not agree with that characterization of his account. When he was unable to recall a detail, he said so. He impressed me as forthright. I credit his account.

Fischer testified without contradiction that Laciura told him on October 22, 1980 to be careful with his union activity and to relay that warning to other reporters.

D. The layoffs in October 1980

1. General Counsel's case-in-chief

At the Local 103 meeting in late September 1980, an in-plant organizing committee for the editorial department was formed. It consisted of Richard Maddock, Ron Duhl, Jack Fischer, Patrick McDonnell, Ray Alvareztorres and Diana Curcio. On October 21, Local 103 wrote Respondent to advise that it was in the process of organizing the editorial department employees and warned Respondent against engaging in any conduct designed to interfere with the rights of those employees to select Local 103. That letter was sent by certified mail and was received by Respondent on October 28.

On October 23, Local 103 filed the petition in Case No. 22-RC-8359 received by Respondent on October 28. On October 24, 7 editorial department employees were laid off. These were Jack Fischer, Ron Duhl, Patrick McDonnell, David Steiffel, Lisa Rubin, Richard Goldensohn and John Ensslin. All but Goldensohn had signed Local 103 cards.

On October 26, Respondent laid off another reporter, Margaret Vogel and on the following day it laid off David Neustadt. Both of those employees had signed Local 103 cards. Vogel testified that in January 1981 she had heard that there were openings in the editorial department and she telephoned executive editor Vezza then to ask for her job back. She testified that Vezza told her that it was against company policy to hire back any of the employees laid off in October until "the suit is settled." The quoted remark obviously would be a reference to the unfair labor practice charge filed concerning the alleged unlawful layoffs of the reporters in October 1980. Vezza testified that Vogel spoke either to him or to one of the editors under him and that she wanted her job back. Vezza testified that she was told that there were no job openings then. He denied discussing "the court proceedings" with her. He testified he told her that Respondent was not hiring reporters. I credit Vogel's account as Respondent's payroll records show that reporters were in fact hired and as Vezza's direct testimony in significant areas was developed by way of leading questions.

Neustadt testified that he was told on October 27 by managing editor Smith that he was laid off and that Smith expressed his regret. Neustadt testified that he then told Smith that "people are organizing a union" and that "it sure looks like that's what this was about." He stated that Smith responded that there are good unions and bad unions. At that point, according to Neustadt, he told Smith that it was ironic that he was getting laid off as he had not been too active in the union drive. Two months later, Neustadt was recalled to work by Respondent and, as of the hearing before me, he was on leave of absence. Goldensohn, the only employee in October 1980 who had not signed a Local 103 card was recalled in February 1981 and is now a city editor.

David Stieffel testified that he was told on October 26, 1980 that he was laid off; two hours later he was told that that was a mistake. Apparently Stieffel and another individual not named on the complaint were the other two of ten employees Respondent laid off in October, 1980.

All of the employees laid off had had no advance notice that they were to be laid off. One of them, McDonnell, had received a merit increase two weeks before his layoff. McDonnell testified that executive editor Vezza told him on October 24 that Respondent was "laying off people (it) didn't feel were happy here" and that its publisher, John Buzzetta had a strong preference "in deciding who would be laid off." Another of the employees laid off in October 1980, David Stieffel also testified for General Counsel that, when he was laid off, he was told that Respondent was laying off employees who were not happy with it.

Another laid-off employee, Lisa Rubin, testified that she had been placed on probation a month prior to her layoff but had been told, shortly before her layoff, that she was making excellent progress in her probation. The General Counsel offered testimony, which was corroborated by Respondent's records, which established that 19 editorial department employees were hired after the October layoffs and by September 30, 1981, principally as replacements for editorial department employees who had resigned.

The uncontroverted testimony of Jeff Kisseloff, which I credit, established that city editor Laura called the layoffs in October 1980 "union busting". In addition, the General Counsel proffered evidence that wage increases were given to editorial department employees before and after the layoffs in October.

2. Respondent's case in rebuttal

Respondent offered the testimony of Deal Singleton, John Buzzetta, Richard Vezza and Fred Antoniotti to support its contention that it laid off reporters in October 1980 purely for economic reasons. Singleton is president of Respondent News and Respond Dispatch and also executive vice-president of Respondent Allbritton; Buzzetta is the publisher of Respondent News; Vegga had been executive editor for Respondent News and Respondent Dispatch; Fred Antoniotti is vice-president in charge of finance of Respondent News and Respondent Dispatch.

Singleton testified as follows respecting Respondent's decision to lay off reporters in October 1980. He had discussed the economic condition of Respondent News on July 12, 1980 with Joe Allbritton, chairman of Respondent's board of directors and afterwards they began to plan the closedown of that paper on August 1, 1980. Singleton's pleaded for one more try at saving it and was given that opportunity. He began in August 1980 having discussions with each department head to effect further savings and he discussed with Buzzetta and Vezza then the layoffs of people in the newsroom. They decided to reduce the editorial staff by attrition and realized that at least 10 employees would have to go, six from the staff of Respondent News and four from that of Respondent Dispatch. All through September 1980 they discussed that matter. On October 24, 1980 he (Singleton) received a telephone call from Wilmot Lewis, a consultant for Respondent Allbritton and Singleton's predecessor, who told him that Local 103 was trying to organize the editorial department employees. On that same date, October 24, Singleton called Vezza to his office and told him that the budget for the editorial department had been disapproved and that he had to lay off a specific number of people that night.

Vezza's testimony as to the layoffs is as follows: In June or July 1980, Singleton told him to prepare the editorial departments [sic] budget for the fiscal year beginning on October 1, 1980. He asked Singleton if he could hire employees and was told he could not but that he could provide for a very modest wage increase for the employees in his department. He was then preparing a budget for the editorial department of Respondent News and also for the editorial department of Respondent Dispatch. He asked Singleton if he could, by cutting costs elsewhere, provide for more substantial wage increases and was told that that sounded fine and that he should work it out and submit the budget. He prepared the budget along those lines and submitted it to Singleton in late August or early September 1980. Singleton told him then that he had too many people in these departments, that he was "out of line with industry guidelines", and that he should make some effort to cut the number of employees through attrition. He was not given a time frame in which that was to be done. Instead of reducing his staff by attrition, however, Vezza hired five reporters as replacements in September and early October, and also granted wage increases. Singleton accepted the budget Vezza prepared and did not ask him to revise it. Vezza thus assumed that the budget he submitted was to be followed. On October 24, 1980, he was called to Singleton's office and was told then by Singleton, in Buzzetta's presence, that the size of the editorial staff at Respondent News must be about 44 and that a proportionate reduction was also to be made in the editorial staff of Respondent Dispatch. The layoffs were to be effected that very evening. He never had received a revised budget but worked from the one he had given Singleton two months previously. (The testimony of Jeff Kisseloff is that Vezza met with the editorial employees after the layoffs in October and told them that he had received a new budget and that the layoffs were based on attitudes generally.)

Buzzetta testified that he discussed the October layoffs with Singleton and later told Vezza that he would have to decrease his staff by six people at Respondent News. Buzzetta further testified that he had, for several months prior to that last discussion with Vezza, been discussing with Vezza the need to reduce the size of Vezza's work force by attrition and Vezza's lack of success thereon.

Antoniotti testified for Respondent as follows: As financial vice-president, he assists department heads in preparing their department budgets each year. The fiscal year begins October 1 and ends September 30. He was present when Singleton, Buzzetta and Vezza discussed the budget for the year beginning October 1, 1980. The "normal review" took place at that meeting. A question was raised then about Vezza's payroll being too high and it was "shaved down a little" at that meeting. The budget that Vezza prepared was then accepted. He, Antoniotti, then incorporated it in the final draft. No changes were made in the budget after that.

Respecting the carrying out of the decision to layoff reporters on October 24, 1980, Vezza testified that he handled that matter for Respondent News and delegated to the managing editor of Respondent Dispatch, David Smith, the responsibility for selecting the reporters to be laid off at that paper. Vezza testified that he suggested to Smith that Lisa Ruban and David Neustadt should be laid off as they were then on probation or very close to it. Vezza testified that he and Smith later discussed the selections Smith made and his reasons for doing so. Smith did not testify before me.

In the course of General Counsel's case, Respondent took the position that McDonnell had been selected for layoff on October 24 because he and a large number of other reporters had signed an undated letter which had been sent to Joseph Allbritton and which was critical of John Buzzetta, the publisher of Respondent News. Mc-

Donnell, however, testified without contradiction that that letter had been sent several months before the October 24, 1980 layoff and that Buzzetta had in the summer of 1980 met with the reporters who signed it to assure them that there would be no reprisals against any of them for having signed that letter. Further, McDonnell testified that he had received a merit raise two weeks before he was laid off in October 1980. Twenty four reporters signed that letter, including at least two who were later promoted to the supervisory level.

Respondent further stated at the hearing that McDonnell's selection for layoff was also based on his having written a story which led to a libel suit. Vezza did not refer in his testimony to any such story as the basis for McDonnell's layoff. Admittedly, no reference to any such story was made when McDonnell was told by Respondent of his layoff. McDonnell acknowledged that several months before his layoff, he wrote a story which was edited and approved by his supervisors prior to publication and that he had heard that Respondent had settled a libel claim based on that story.

Respondent also asserted at the hearing that another possible reason for McDonnell's being selected for layoff was that he was looking for employment elsewhere. However, that contention was not pressed.

Vezza testified for Respondent that Fischer's selection for layoff was justified as he had "recently" (i.e.—in relation to the October 24 layoff) embarrassed the paper by his inept coverage of a story about a propane gas truck blocking traffic on the George Washington Bridge. That story was written, however, during the summer of 1980 and Fischer was one of several reporters later assigned to cover the Democratic national convention in New York City. Vezza acknowledged that he had wanted his most qualified reporters to cover that event. McDonnell was one of those reporters also.

Respondent offered evidence, essentially uncontroverted, that established that, for years, it has suffered operating losses at Respondent News and Respondent Dispatch. The losses at Respondent Dispatch were not nearly as large as those at Respondent News and were offset in 1980 by the sale of its building. The General Counsel adduced evidence that Respondent incurred huge expenses in early 1981 in hiring and training replacements for mailroom employers/drivers, as discussed above; that evidence was offered, *inter alia*, to discount the economic defense asserted by Respondent.

E. Analysis: alleged warnings and threats, alleged discriminatory layoffs

The uncontroverted evidence establishes that, in September 1980, Respondent through its associate editor, Philip Laciura, told reported David Stieffel and other employees not to talk so loud about "that kind of thing" when they had been discussing the subject of signing authorization cards for Local 103. That warning by Laciura tended to discourage the reporters in exercising their rights under Section 7 of the Act, even more so as it came from a friendly supervisor.[19]

For the same reason I find that Laciura's warning to Alessi in the fall of 1980 against his continuing to solicit cards for Local 103 interfered with employees' Section 7 rights, as did his warning on October 22, 1980 to Fischer and other reporters.

The uncontroverted, credited evidence also established that Respondent, by its city editor Laura, in his statement to employee Kisseloff in October 1980, threatened employees with discharge to discourage them from supporting Local 103.

---

[19] *Caster Mold and Machine Company, Inc.*, 148 NLRB 1614 (1964).

Although not alleged as a violation but relevant to the question of union *animus* is the uncontroverted, credited testimony, discussed below, of James Scofield that Respondent's pressroom supervisor, Andrew Brown, told him in October 1980 that Singleton would punish Local 103 for trying to organize the reporters.

The amended complaint alleges that eight named employees were discriminatorily laid off by Respondent in late October 1980. The legal principles applicable to deciding the merits, or lack thereof, of that allegation are clear. The General Counsel and Respondent have propounded them in their respective briefs. I will summarize, without citation, those principles.

It is well settled that the General Counsel must show by a preponderance of the credible evidence that those employees were laid off by Respondent to discourage support for Local 103. The determination as to whether or not they were so laid off requires the weighing of all relevant evidence and the drawing of appropriate inferences from the credited accounts. It is not essential that General Counsel show an express admission by Respondent's principal official that it was motivated by an unlawful intent. An employer may discharge an employee for a good reason, a poor reason or none at all so long as it does not violate the Act. Relevant factors in deciding the issue include admissions thereon, the extent of the union activity, an employer's knowledge or lack thereof as to that activity, the timing and manner of the alleged discriminatory conduct relevant to that activity, evidence of separate acts of union *animus*, the validity of the reasons given by an employer for its acts or the lack thereof as may be evidenced by shifting or unsupported reasons, or the like.

The relevant testimony respecting the alleged discriminatory discharges on October 24, 26 and 27, 1980 discloses the following:

All of the alleged discriminatorees were active for Local 103. All but Goldensohn had signed Local 103 cards. McDonnell, Fischer and Duhl were known to Respondent as active supporters of Local 103. None of the alleged discriminatees had any advance notice from Respondent that they would be laid off. Respondent's officials had on various occasions warned employees and threatened to discharge them for engaging in activities in support of Local 103.

Singleton testified that, based on purely economic considerations, a decision was reached on October 24 to layoff 10 reporters and he directed that they all were to be laid off by the end of that workday. According to his account, it had to be but an extraordinary coincidence that he learned that same day, from Respondent's consultant, of Local 103's interest and also a coincidence that Local 103's drive had culminated in the filing of a petition for an election. Were that so, I must infer too that two of his senior officials, Vezza and Smith, kept him in the dark as to Local 103's interest.

Singleton testified that he based his decision to lay off the ten reporters on his further assertion that the budget had been rejected. It would appear from the overall record, including the transcript of the earlier representation case that Singleton is the one has [sic] the authority to reject the budget. No independent evidence or documentaly material was submitted to support his testimony that the editorial department budget was rejected that day or to establish that it was essential to the economic survival of Respondent that 10 employees be laid off that very day. Rather, the evidence in the record controverts that testimony by Singleton. Vezza and Antoniotti testified that the original budget was always used. Buzzetta's account avoided a reference to that matter.

I credit the accounts of McDonnell and others that they were told, when laid off, that it was because they

were not happy—a not too subtle reference in the circumstances to their interest in Local 103. I also note that 90% of the laid off employees signed Local 103 cards; Local 103's card majority, as recounted below, was considerably smaller.

Respondent's effort to establish an economic defense were not very successful. Singleton's effort to show that he was given one last chance by Joseph Allbritton to save Respondent News was undercut by the facts. He testified he told Vezza that it was critical to reduce the work force by Allbritton. I am asked to accept also that Vezza nevertheless hired 5 reporters and gave out wage increases.

Respondent's further efforts to establish that McDonnell, Fischer and the others were selected on the basis of non-discriminatory factors are also unconvincing.

Overall, the unsupported, inconsistent, shifting, contradictory and patently improbable reasons proffered as to both the decision to effect a lay-off of 10 reporters and as to the basis for the selection of those laid off compel me to reject the defense offered by Respondent and to find that the pretextual nature of those asserted reasons support instead General Counsel's contention.[20] Respondent urges too that weight should be given to the fact that several of the alleged discriminatees have been called back to work. I must also note that one of them was the only one who had not signed a Local 103 card and that another, Neustadt, had informed Smith that his activities for Local 103 were minimal. In any event, I view Respondent's actions in recalling those reporters as purely remedial and clearly inadequate to offset the overall evidence supporting General Counsel's contentions.[21]

---

[20] *Traverse City Osteopathic Hospital.*, 260 NLRB No. 147 (1982).

[21] *Cf. Chandler Motors, Inc.*, 236 NLRB 1565, at fn. 4 (1978).

Respondent contended also that it took into account "industry guidelines" in deciding to reduce its editorial staff by 10 reporters. To my mind, that very concept conveys the pursuit of a deliberate program by top management over an extended period to achieve parity. It does not suggest to me the summary execution of a major personnel cutback without advance notice to virtually anyone. For that matter, Vezza's testimony was not convincing as to exactly how those guidelines were met. He drew vague correlations between staff size and circulation. I was left with the impression that he had never made a precise analysis of the ratio of departmental personnel to the paper's circulation figures. His later statement to Vogel that she could not come back until this case is over shows that industry guidelines were never a real factor.

The credited testimony establishes that all of the employees laid off in late October 1980, were active for Local 103, that Respondent was aware of that activity, that Respondent separately exhibited hostility to that activity, that Respondent acted in a summary manner at the virtual peak of that activity to lay off those employees because they were "not happy" and that Respondent then proffered obviously pretextual reasons respecting both the decision to lay them off and the selection of those laid off. Based on those considerations and the totality of the evidence, I find that General Counsel has shown by a preponderance of the credible evidence that those employees had been discharged in order to discourage support for Local 103.[22]

F. The Discharge of Dale Rim

The General Counsel contends that Dale Rim was discharged because he refused to perform struck work. Respondent asserts that the work Rim refused to do was

[22] *Corn Brothers, Inc.*, 262 NLRB No. 41 (1982). *D.M. Rotary Press, Inc.*, 208 NLRB 366 (1974).

not struck work and thus urges that he was lawfully discharged for insubordination.

Dale Rim worked for Respondent Dispatch as a sports writer under executive sports editor, Robert O'Conner. In February 1981, as discussed in more detail below, Local 103 called a strike of the composing room employees. Rim was told by O'Conner then that he would not have to do struck work. On February 16, 1981, O'Conner told him to typeset the results of the trotting races at Freehold, New Jersey. He declined citing the guarantee he was given against doing struck work. O'Conner told him to leave the building and he did. He returned to work the following day. Executive editor Vezza informed him then that he had been discharged the previous day for insubordination.

Rim testified that no one from the sports department ever set the summary results of the Freehold and that that job was always done by composing room employees, represented by Local 103. The job consists of typing information into a video display terminal in a manner similar to the method used by sports writers in entering the more complex racing data for other tracks, e.g.—charts, predictions, post positions.

Jack Alessi, chapel chairman of the composing room employees for Local 103, testified without contradiction that, in 1977 or 1978, he attended a grievance meeting with the publisher then as to the setting of the Freehold results and, when he explained Local 103's claim to the publisher, the publisher informed him that that work belonged to Local 103's jurisdiction and that he would instruct the editorial employees to stop setting it. Alessi testified that, since then, there has been no dispute over the work as composing room employees always did it.

Executive sports editor O'Conner testified that in most instances the composing room employees set the Freehold results but that, on occasion, an editorial department em-

ployee did. In a pre-hearing affidavit, he stated that the editorial employees set the Freehold results on one or two occasions over the previous four years. Editorial employees have performed the Freehold work since the start of the Local 103 strike. O'Conner's testimony suggests that Rim had typeset the Freehold results once on a prior occasion. Insofar as any credibility issue thereon may exist, I would credit Rim's testimony which in essence, is that he refused to perform the Freehold work on the first occasion that O'Conner assigned him to it.

As the evidence discloses that the setting of the Freehold results was work that had virtually always been done by the striking composing room employees as of February 16, 1981, and as Respondent's publisher had conceded Local 103's claim thereon, I find that O'Conner sought to assign Rim to struck work on that date and that Rim was discharged therefor. Respondent thereby interfered with Rim's rights under Section 7 of the Act.[23]

Respondent asserts that Rim was engaged in a partial strike on February 16 and that it had the right to lay him off for the duration of the Local 103 strike. Both assertions assume facts which do not exist. Rim did his normal job; he was discharged, not laid off.

G. The Discharge of Charles Macaluso

The General Counsel contends that Macaluso was discharged by Respondent because he supported Local 103 and because he testified in the hearing held in Case No. 22-RC-8359. Respondent asserts that he was discharged for having abused his sick leave.

Macaluso worked for Respondent News as its racing editor from November 1979, until his discharge on February 27, 1981. He signed a Local 103 authorization card in March 1980, attended Local 103 organizational

---

[23] *Cooper Thermometer Company*, 154 NLRB 502 (1965).

meetings, was a member of its organizing committee and testified in Local 103's behalf at the representation case hearing. The composing room employees represented by Local 103 struck in February 1981, as discussed in a separate section below. A day or so later, Macaluso called in sick and was placed on sick leave. He was treated for pleurisy and kept executive sports editor Robert O'Conner advised of his condition. His sick leave was extended to March 1, 1981. Macaluso testified that, as he was beginning to get better, he informed O'Conner that his doctor told him he could go out of his house for brief periods. O'Conner's testimony is simply that Macaluso told him he could not come back until March 1, 1981. I credit O'Conner as he impressed me as one who would expect an employee to come to the office as soon as he was able and, if Macaluso had told him that he could go out in the cold of winter despite a pleurisy attack, O'Conner would likely have suggested that he spend any such time in the office.

On Thursday evening, February 26, Macaluso went to a tavern near his house to talk with a few co-workers. He sipped one beer until 2:30 a.m. on Friday, February 27. As he left the tavern, he was observed by Respondent's executive editor, Vezza; Vezza was driving home from a similar gathering and almost hit Macaluso with his car as Macaluso left that tavern.

Macaluso was discharged the next day. He was told he made Vezza and the others look like fools as they were "busting their butts" while Macaluso was on sick leave. Macaluso testified that Vezza referred to the fact that an employee named Fistel was told not to show up at the tavern where Macaluso was on the preceding night and Macaluso disclaimed any knowledge of that matter. Macaluso testified that he learned after his discharge that Fistel was not invited because his co-workers believed he relayed information to Vezza.

No evidence of disparate treatment was offered. There is little to show that the reason given by Respondent for

discharging Macaluso was a pretext. He was on extended sick leave, reportedly for a serious chest infection and yet was able to go out for several hours in mid-winter to have a beer in a tavern. I find that the evidence is insufficient to establish that Macaluso was discharged because of his activities for Local 103 or for having given testimony under the Act.[24]

H. Alleged majority status of Local 103

The General Counsel contends that a majority of the editorial employees had designated Local 103 as their collective bargaining representative by late October 1980 and that, an appropriate remedy for the violations of the Act committed by Respondent is that it be required to bargain collectively with Local 103 respecting that unit. Respondent's answer places in issue the allegations as to the appropriate unit, Local 103's majority status therein and as a result, the remedy sought.

In the Decision and Direction of Election issued in Case No. 22-RC-8359 on July 7, 1981 it had been determined that a unit comprised of all editorial department employees employed by Respondent News and Respondent Dispatch was appropriate. Respondent's request for review of that Decision and Direction of Election was denied insofar as it pertained to the matter of the appropriateness of the unit. I have reviewed the entire transcript of the hearing in that representation case and the exhibits received at it and have considered also the testimony offered at the hearing before me. No new factual issues were raised before me.

Respondent's payroll records list the names of 85 individuals as employees[25] in that unit as of October 24,

---

[24] *Alcar Industries, Inc.*, 260 NLRB No. 94 (1982).

[25] The General Counsel would exclude two of them, namely Michael Fistel and Craig Meyer, as supervisors. While their unit placement would not offset Local 103's majority status, I would exclude them

1980, the date of the discriminatorily motivated discharges, found above. 48 of those 85 individuals had signed Local 103 cards by then.[26]

Respondent asserts that some of those 48 signed cards should not be counted towards Local 103's majority status on the ground that they were not properly authenticated. In particular, it challenged the cards bearing the signatures of William Boyer and Charles Zoeller [27] which were received in evidence based on the testimony of Jeffrey Kisseloff who related that he gave those individuals and others Local 103 cards which were later returned to him by those individuals, with the cards signed and dated. Respondent challenged other cards which were authenticated by the testimony of David Stieffel.

Respondent urges me, in essence, to take a response by Stieffel out of context. Respondent further contested the validity of the signatures of employees Nicholas Romei and Rachelle Cantlupe on cards which General Counsel's witness, Ramon Alvareztorres, testified were given by them to him. I have considered those objections and am satisfied that those cards had been properly authenticated.

Respondent, in its brief, asserts that the card signed by Catherine Ward was not authenticated. It was, but had

---

from the unit as supervisors, for the sake of clarity, as they possessed and exercised the authority to responsibly direct employees under them.

[26] The General Counsel submitted 8 other signed cards. Three were dated October 30, 1980; one was dated November 4, 1980; one other was dated November 24, 1980; two others were signed by individuals whose names were apparently inadvertently crossed off Respondent's payroll roster (i.e.—Richard Maddoch and John Rudolph Dicks); and another card was signed by an individual Joseph Ruda, whom General Counsel would exclude as a supervisor. In all, 56 were placed in evidence.

[27] It also challenged a card dated November 4, 1980,—not one of the 48.

been incorrectly designated as GC 3 (bbb) instead of Sec. 3 (ddd).

I thus conclude that, on October 24, Local 103 had been designated, *via* signed authorization cards, by a majority of the employees in the editorial unit to represent them for the purpose of collective bargaining with Respondent.

I. Whether a *Gissel* Bargaining Order is Appropriate

The U.S. Supreme Court has held that an employer may be ordered to bargain with a minority union if it has committed such outrageous and pervasive unfair labor practices as to have eliminated the possibility of holding a fair election.[28] The General Counsel has urged in his brief that Respondent committed such unfair labor practices but does not state that the possibility of holding a fair election has been thereby eliminated. I doubt that the General Counsel is seeking a minority bargaining order but, to put the matter in perspective, I find that Respondent's unlawful acts were not such as to warrant the issuance of a bargaining order, were Local 103 a minority union.[29]

In *Gissel, supra*, the U.S. Supreme Court further held that, where a union has been designated by a majority of the employees to represent them, a bargaining order may issue in less extraordinary cases marked by less pervasive unfair labor practices which tended to undermine the union's majority strength and to impede the election processes. Respondent asserts that the layoffs of ten employees cannot be found to be pervasive as that conduct affected but 10% of the employees in the unit. I do not view those layoffs or the *Gissel* remedy that mechanically. I

---

[28] *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575 (1969).

[29] Cf. *Conair Corp.*, 261 NLRB No. 178 (1982); *United Supermarkets, Inc.*, 261 NLRB No. 179 (1982).

have found that eight editorial employees were permanently laid off at the height of Local 103's campaign and that they were put out of Respondent's premises immediately on Respondent's orders. When one sought to return after learning that Respondent was hiring new employees in its editorial unit, she was told that she would not be hired as long as this case is open. Another employee was told that Respondent would use the judicial system itself to frustrate Local 103's effort to represent the editorial employees. Another was told that Respondent would punish Local 103 for attempting to organize the editorial employees. When the employees in the sports section of Respondent Dispatch crossed the Local 103 composing room picket line, virtually all were given unexpected raises.[30] In view of the foregoing and the other unfair labor practices found above, I find that the possibility of erasing the effects of that conduct and of holding a fair election by the use of traditional remedies is slight and that the expression of the wishes of the majority of the unit employees, as evidenced by the authorization cards they signed, would be, on balance, better protected by a bargaining order.[31] That finding is buttressed separately by the unlawful conduct Respondent evidenced towards employees in the composing room unit, discussed separately below; the "fallout" from those other unfair labor practices had to have reached into the editorial unit, especially as the same labor organization was involved.

---

[30] Dale Rim testified all employees in its sports department got raises; O'Conner testified for Respondent that only 5 or 6 did. The payroll records in evidence indicate that there were about 7 employees in that department.

[31] Granite City Journal, Inc., 262 NLRB No. 140 (1982). The bargaining order shall be effective from October 24, 1980 when the discriminatory layoffs occurred and Local 103 represented a unit majority. See *Ja-Wex Sportswear Ltd.* and *Iris Sportswear, Inc.*, 260 NLRB No. 172 (1982).

Respondent's failure and refusal to honor Local 103's bargaining demand respecting the editorial unit was violative of Section 8(a)(5) of the Act.[32]

V. The Composing Room Employees

A. Background and contentions.

As set out in the Decision and Direction of Election issued on July 7, 1981 in Case No. 22-RC-8359, Respondent News and Respondent Dispatch had, prior to 1979, separate composing rooms. Paterson International Typographical Union Local No. 9004 represented the composing room employees of Respondent News then; Hoboken Typographical Union Local No. 323 represented the composing employees of Respondent Dispatch. In 1979, the composing room operations of Respondent News and Respondent Dispatch were consolidated at the Respondent News plant in Paterson. The two locals which had separately represented the respective units of composing room employees merged with Local 103. Local 103 has since 1979 represented the combined unit of composing room employees employed at the Paterson facility.

In 1977, when Respondent Allbritton purchased Respondent News and Respondent Dispatch, there was a total of about 125 employees in the composing rooms at Respondent News and at Respondent Dispatch. By switching from "hot type" to "cold type" and by making other changes agreed to by Local 103, the employee complement in the composing room had been reduced to approximately 50 employees by late 1980.

In late October, 1980 as related above, Local 103 had written Respondent that it was engaged in a campaign to organize the editorial department employees of Respondent, who were unrepresented. A few days later Local 103 wrote Respondent that a majority of those em-

---

[32] *Precision Graphics, Inc.*, 256 NLRB No. 57 (1981).

ployees had selected Local 103 as their bargaining agent and Local 103 requested Respondent to negotiate with it as their representative. About this same time, as discussed further below, Local 103 was getting ready to meet with Respondent to negotiate a new collective bargaining agreement with Respondent, covering the composing room employees, to become effective upon the expiration of the contract, in January 1981.

It is against this background that the General Counsel and Respondent presented evidence as to the issues pertaining to the composing room employees in this case. In broad terms, the General Counsel contends, and Respondent denies, that Respondent engaged in bad faith bargaining with Local 103 since December 2, 1980 with respect to the composing room unit. The General Counsel urges that Respondent demonstrated its bad faith in these ways: (1) by having engaged in surface bargaining, (2) by having unilaterally changed the wages and the hours of the composing room employees during the course of negotiations despite the fact that no bargaining impasse had been reached and (3) by having refused to negotiate with Local 103's designated representatives which included the president of NMDU.

Other issues for resolution include: (1) whether the strike by the composing room employees was caused or prolonged by unfair labor practices of Respondent, (2) whether Local 103's request that Respondent reinstate those striking employees was unconditional, (3) whether Respondent promised benefits to induce an employee to enlist co-workers to decertify Local 103 as the exclusive representative of the composing room unit, (4) whether Respondent unlawfully sued each of the striking employees for damages in a state court civil action, (5) whether Respondent unlawfully refused to pay (or to arbitrate a claim as to) monies allegedly due composing room employees for accrued vacation benefits and personal days, and (6) whether Respondent engaged in other acts de-

signed to interfere with the Section 7 rights of the composing room employees.

B. Scofield's testimony.

James Scofield testified for General Counsel. He is president of Newark Newspaper Printing Pressmen's Union Local No. 8 which represents the press employees employed by Respondent News and Respondent Dispatch at their respective pressrooms in Paterson and Union City, New Jersey. He testified that, in October 1980, he had been working in the pressroom at Paterson and had gone there to pick up a pay check when he had the following discussion with Andrew Brown, the director of operations for Respondent at the Paterson facility. According to Scofield, he and Brown referred to Local 103's effort to organize the editorial employees when Brown stated that Respondent's president, Dean Singleton, would punish Local 103 for trying to organize the reporters and that Singleton would not give the composing room employees a raise. The pleadings establish that Brown is a supervisor of Respondent. Brown did not testify at the hearing before me. Singleton denied that he had ever told anyone that he would punish Local 103 for seeking to represent the editorial employees.[33] It is most unlikely that Brown invented the remarks quoted by Scofield. It is more probable that he was stating what he had heard Singleton say. I do not credit Singleton's testimony. I credit Scofield's account as he impressed me as candid and as it was not controverted by Brown.

---

[33] Respondent asserts that Scofield's testimony is inadmissible as double hearsay. Rather, it discloses an admission against interest which, by definition, is not hearsay. That the admission is by way of a quote does not render it inadmissible. Rule 805 of the Federal Rules of Evidence provides that hearsay within hearsay is admissible if both meet appropriate exceptions to the hearsay rule. Perforce, an admission against interest within an admission against interest would be admissible.

C. The negotiations between Respondent and Local 103; the strike by composing room employees; their offer to return; related matters.

1. The start of negotiations for a renewal contract.

As noted earlier, the contract for the composing room employees had been scheduled to expire on January 25, 1981. On October 30, 1980 John Buzzetta, publisher of Respondent News, wrote Local 103's president, Thomas Callahan, to inform him that the contract between Respondent News and Local 103 was about to expire and that Respondent News desired to begin negotiating for a new contract. Dean Singleton, Respondent's president, met with Callahan on November 13, 1980 and told Callahan then that Respondent had put together an economic recovery plan for the newspaper in which every department was going to have to give something. Singleton told Callahan that Respondent would have to save the equivalent of $35 per man or a total of $91,000 in the composing room.

David Winkworth, a labor consultant who has negotiated contracts on behalf of Respondent News and other newspapers for many years, telephoned Callahan in November, 1980 and they then scheduled the first bargaining session for a renewal contract for December 2, 1980.

2. The December 2 meeting.

Joseph Alessi, chapel chairman of the composing room employees of Respondent, testified for General Counsel that at the December 2 meeting, Local 103 presented its demands to Respondent and that the parties then reviewed the "non-economic" terms of the contract then in effect. According to Alessi, agreement was reached to keep those "non-economic" items unchanged and, on that basis, he noted "OK" alongside each non-economic clause as it appeared on his copy of that contract. Winkworth, who testified for Respondent, essentially corroborated Alessi's

testimony thereon. In the bargaining notes taken by Alessi as to that meeting, he noted that "the company gave tentative agreement (to the non-economic items) with the option to discuss (them) further if necessary." John Buzzetta, publisher of Respondent News, testified that, at that first meeting, the parties "went through the contract and decided to leave the noneconomic issues until after we reached agreement on the (economic) issues." He also testified that the parties agreed to leave the non-economic issues as the last of the matters to be negotiated.

Buzzetta told the Local 103 representatives that Respondent News had lost $480,000 in its fiscal year which ended September 30, 1980. He informed them also of a decline in the circulation of the newspaper published by Respondent News and of its advertising revenue. Winkworth gave Callahan Respondent's typewritten counter-proposals which read as follows:

1. A 15 percent pay cut for all employees represented by the contract.
2. A change to a 40 hour work week for any shift.
3. A change to 5 personal days per year from the present 10.
4. The option at a later date to separate the composing room between Hudson Dispatch and News Printing Co., Inc.

Buzzetta testified that he had brought to that meeting the financial statement for Respondent News' last fiscal year and that it was available then for inspection by Local 103. Winkworth testified that Buzzetta indicated to Local 103 that it could verify his statements respecting the losses suffered by Respondent News. Alessi's account substantially corroborates that testimony. Local 103 did not seek such verification then.

The meeting ended when the parties agreed to meet again on December 11, 1980.

3. The December 11 meeting.

Alessi testified as follows respecting the December 11 meeting. Winkworth told Local 103 that Respondent had looked over Local 103's demands and that everything in those demands added costs to the contract then in effect. Buzzetta said that Respondent cannot add any costs but would stick to the proposals it made, no matter what. Local 103's president, Callahan, said that everything is negotiable.

Winkworth testified as follows as to that meeting. Buzzetta explained that Respondent News had suffered a loss in November, 1980 and that that was unusual as November was normally a very good month for newspapers. Buzzetta stated that it was critical that some kind of arrangement be worked out which would result in a reduction of the composing room costs. Winkworth and Callahan then began to discuss the possibility of continuing the contract then in effect but without a wage increase. Buzzetta interrupted their conversation and said that such a continuation would not be satisfactory but that a decrease in the total cost was required. Callahan then suggested that the parties discuss vacations and other fringe benefit matters. Winkworth replied that the parties should not be "fussing around" with the "side issues" and that they should all try to solve the basic problem which pertained to the wage section of the contract. The meeting ended, with Callahan's advising that he would review the matters with Local 103's members.

Buzzetta testified that on December 11 he kept pressing for the relief he felt was needed and that Callahan kept saying that he was understanding but that he did not think there was much that he could do about it. Buzzetta testified that they agreed to tackle the wage problem first and leave everything else for last.

I credit Alessi's account that Buzzetta stated at that session that Respondent would stick to its demands no

matter what. His testimony thereon was no directly controverted but was in fact indirectly confirmed.

4. The December 17 meeting.

At the next meeting, December 17, 1980, according to Alessi's testimony, Callahan informed Respondent that the chapel had unanimously rejected Respondent's demands. Alessi recounted that Buzzetta then gave figures as to losses sustained by Respondent and advised that Respondent had to have "givebacks." According to Alessi, Callahan then responded that, whenever there had been economic problems in the past, all of the unions had gotten together with Respondent in joint negotiations so that "everybody could give a little." Buzzetta responded, according to Alessi, that he would not have joint negotiations. Alessi testified further that Callahan stated that Respondent should get together with the other unions to see where they are going and to get back to Local 103 after the holidays. The minutes of the meeting which were kept by Alessi correspond to the testimony he gave at the hearing.

Winkworth testified for Respondent that the same issues were discussed on December 17 as had been discussed on December 11 and in particular that Buzzetta advised that the loss he had reported in revenue at the last meeting had since been confirmed and that it was in the neighborhood of $28,000 for the month of November, 1980.

Buzzetta testified that, at the December 12 meeting, he had the exact figures showing a loss of $28,000 for November and he stated he told Local 103 that if Respondent cannot make money in November, there is no way that it can stay in business. Buzzetta testified that he asked Callahan to bring in a representative from his International in order to get things moving but that Callahan responded that he though it was too early to

do that and advised instead that the earliest the next meeting could be held was on January 14, 1981.

5. The January 14 meeting.

Singleton, Respondent's president, testified that, on January 12, 1981 (2 days before the scheduled resumption of the negotiations) he had lunch with Local 103's president, Callahan, in order to assess the problems they were facing. Singleton testified that Callahan told him that he felt that Singleton should lay out, at the bargaining session on January 14, what Singleton's bottom line proposals were and that Callahan gave him assurance that Local 103 would cooperate in trying to reach an agreement. Callahan did not testify before me.

Alessi testified as follows as to the January 14 meeting. Callahan asked Singleton if Respondent News was going to be shut down. It appears that there was a rumor being circulated to that effect. Callahan also asked Singleton why he was offering the Pressmen's local a "$88 package deal over 3 years" while offering Local 103 "a one-year contract with givebacks." Singleton answered by stating that Respondent News had lost $400,000 in its last financial period and that its parent company was reluctant to advance any more money unless it got concessions from all unions. Singleton stated that, if they got concessions and had a profit at the end of the year, employees in the composing room would get a raise. Singleton then stated that he was giving up his negotiating stance by putting his bottom line on the table. He said that he wanted to have the last raise given to Local 103 employees, a $35 raise, returned. Singleton advised that, if he got that back, the paper would continue to operate for at least one more year. Singleton stated that he would leave it up to Local 103 to advise how the cut should be taken, whether in wages or in personal days or in holidays or in any combination, as long as it added up to $35 apiece. Local 103

representatives then caucused and returned to advise Singleton that they were going to send for an International representative. Singleton responded that he was happy to hear that. The next bargaining session was set for January 29.

Winkworth testified as follows for Respondent as to the January 14 meeting. Essentially the same matters were reviewed on January 14 as had been talked about in the earlier sessions with the exception that Singleton had joined the Respondent's negotiating committee and "invited" Local 103 to come up with a solution whereby Respondent could save $35 per man per week. Local 103 responded that they could not see how they could do this and it had no ideas for effecting that kind of saving. Singleton said that he was ready to meet around the clock seven days a week to get things resolved before the deadline which he placed at February 10. Singleton advised that he had to have things resolved because he could not continue carrying the deficit the paper was incurring.

Singleton's testimony respecting the January 14 meeting is as follows. He attended because the publisher and the other management officials requested him to attend. At the meeting, he reviewed the earlier proposals with Local 103 representatives. At that point, Callahan asked him what was the "bottom line." Singleton advised him that the bottom line is $35 per person. Singleton stated that one of the other Local 103 representatives then asked, if Local 103 made those concessions, whether the paper would be sold. He responded by stating that, if he got the concessions that he was looking for, the paper would definitely be kept open for another year.

The testimony of publisher John Buzzetta essentially corroborated Singleton's account as to the events of the January 14, 1981 meeting.

6. The January 29, 1981 meeting.

Alessi, the chapel chairman for Local 103, testified as follows respecting the events of January 29. Singleton led off the meeting by stating that he was giving Local 103 until February 10 to reach an agreement with Respondent on a new contract. Callahan responded that Local 103 intended to submit Respondent's proposal on the $35 pay cut to the unit employees at a chapel meeting scheduled for that coming Saturday. Callahan also told Singleton that the International representative who had been assigned to come in to assist in the contract negotiations, Tom McGrath, had had a heart attack and that the only other International representative available, was Allen Heritage who could not get into the area until around February 10. Singleton responded that that was not acceptable, that it was nothing but a stall and that he wanted someone there quicker than that. Singleton stated that Callahan better tell his people at the chapel meeting that he (Singleton) wanted that $35 back, no if, ands or buts, and that, if he did not get that $35 back, the Local 103 people do not work for Respondent anymore. He quoted Singleton as saying "I don't give a damn about people anymore. I only care about my paper. And any printer, driver or pressmen who gets in my way, I'll roll right over him." Singleton stated that he felt that he was going to reach an impasse with the pressmen in negotiations which were scheduled for February 5. Singleton also stated that he felt he had already reached an impasse with Local 103. Callahan responded that he had reached no impasse with Local 103 but all he had done was demand, threaten and yell. At that point Fred Temby, Respondent's director of new processes, stated to Callahan, "You guys are full of crap. Your people are a bunch of pussycats. They wouldn't follow you out of the building even if the building was on fire."

Alessi's bargaining minute notes, which Respondent placed in evidence, essentially corroborate Alessi's account given above as to the events on January 29.

David Winkworth, Respondent's labor consultant, testified as follows concerning the negotiations on January 29, 1981. The "whole issue was discussed in great detail." Local 103 advised that it was not ready to accept the conditions suggested by Singleton. Singleton then stated that he was serious about the February 10 deadline and that if Local 103 did not agree to the conditions presented to them, it would be necessary to replace the composing room employees.

Singleton testified as follows respecting that meeting. There were heated comments from both sides. Fred Temby made a presentation on behalf of Respondent as to ways it could save $91,000 in operating the composing room. One of the Local 103 representatives stated that there was just no way Local 103 was going to give up anything for which it bargained for years. Local 103 representatives stated that they had given up so much for so long and they noted that they had fewer people working now than they ever had before. They felt they [sic] given up everything that they can give and that there is nothing else that they were willing to give. At that point, Singleton stated that he had gotten to the point where he himself was not really concerned about any of the people anymore but concerned only with saving the newspaper.

Buzzetta's account of the January 29 meeting is as follows. Fred Temby attended on behalf of Respondent and explained several ways in which savings of $91,000 a year could be effected. There was no movement by Local 103 thereon. Callahan stated that an International representative was supposed to be in attendance at that meeting but had had a heart attack and could not come. Callahan stated that he could not get another International representative to attend.

I credit Alessi's testimony that Singleton stated at the January 29 session that if Local 103 did not give back the $35 raise, the composing room employees do not work for Respondent anymore. Winkworth's account was that Singleton said he would replace them. More likely, in my view, Singleton used the more forceful language attributed to him by Alessi's account.

7. Singleton's telephone conversations with Local 103's International Representatives.

Allen Heritage, vice-president of the ITU, Local 103's International, testified that on February 3, 1981 Joe Bingel, ITU's president, told him that he, Bingel, had received a telephone call from a consultant for Respondent, Bin Lewis, who had at one time been an official of Respondent and that Lewis had discussed the problems developed at "the Paterson News." One of them apparently involved a report that was circulating to the effect that Respondent intended to post working conditions under which the composing room employees would be required to work. (In that regard, I note that Walter Ulinski, a composing room employee testified without contradiction that in January 1981 he asked Respondent's director of new processes, Fred Temby, if there was any truth to the rumor that the company intended to post conditions for its composing room employees, and that Temby replied that the rumor was true and also that if Local 103 did not go along with them, there was no amount of money Respondent would not spend to see that the composing room employees would never have a union again). Heritage testified he called Singleton on February 3, 1981 who told him that Respondent was going to post conditions for the Pressmen on February 5 and for the composing room on February 6, with the conditions to take effect on February 10. On February 4, according to Heritage, he and Bingel attempted to persuade Singleton to postpone the posting of any such

conditions until Heritage could meet with him. Heritage testified that Singleton declined to do so but agreed to meet with him on February 12. Singleton testified at length respecting telephone conversations he had in late January, 1981 with Heritage and Bingel. He did not deny discussing the subject of posting conditions.

8. The February 6 session.

Alessi testified as follows respecting the next negotiating session held. He learned of it when Local 103 received a mailgram from "federal mediator," John Bello, advising that a bargaining session was scheduled for the following day, February 6. After Bello introduced himself at the February 6 meeting, Singleton stated that he had a lot of legal problems out of the way and that he could now offer Local 103 a three year contract, the same as he had offered the other unions. Singleton advised that Local 103 would still have to give back $35 in the first year of the contract but that, in the second year, it would get the $35 back and in the third year, Local 103 employees would receive a $29.50 raise. Singleton gave Local 103 a typewritten copy of Respondent's "final proposal" setting out that offer. Local 103 then caucused and returned. Callahan advised that it was fine that Respondent had made a three year proposal but that Local 103 still can not accept the pay cut. Callahan suggested they start negotiations from the standpoint of a three year contract. Callahan noted that the International representative assigned to participate in negotiations, Allen Heritage, would be in the area around February 10 or 11 and that Local 103 could negotiate thereon after that point. Singleton wanted to know why the International representative could not come in any earlier and Singleton and Callahan "went into the same old hassle" on that matter. Right after that, Singleton handed Callahan a paper on which was contained the terms under which Respondent would employ the com-

posing room employees as of February 10, 1981. Local 103 representatives caucused and determined that there was nothing they could do at that point. Its representatives returned to the bargaining table and discussed with Respondent how they would notify it as to whether the employees would or would not work under those conditions. The meeting thereupon adjourned. Alessi's minutes of the February 6 meeting were received into evidence as an exhibit by Respondent and they substantially comport with the testimony he gave at the hearing.

Winkworth testified for Respondent simply that he was present at the February 6 meeting and that, around the time of that meeting, there were conditions posted which were to become effective on February 10.

Singleton testified respecting the February 6 meeting itself as follows. It was called by a federal mediator at Respondent's request. Local 103 was advised of the urgency of the situation. Then Local 103 expressed concern that the contract offered them was only for one year. Respondent caucused and amended its proposals to offer a three year contract instead of one. Local 103 caucused and the mediator then informed Singleton that he felt there was an impasse and that the parties could make no further progress. At that point, Respondent issued its conditions on which it would employ the composing room employees and it informed Local 103 that those conditions would be posted the following week.

Buzzetta's account is as follows. Respondent had asked the federal mediator to schedule the meeting. Respondent proposed a three year contract as Local 103 had complained at a previous meeting that the pressmen had been offered a three year package whereas Local 103 had been offered only a one year contract. Local 103 after a caucus reported that they would have to take the matter up with their membership. At that point, Respondent advised Local 103 that it would be posting

conditions as of February 10 in the composing room if agreement was not reached by that date. Buzzetta showed to the Local 103 representative a paper listing those conditions.

As related earlier, Singleton had agreed to meet with ITU vice-president, Allen Heritage, on February 12, 1981.

9. Events between February 6 and 12, 1981.

On February 6, 1981 Respondent posted a notice in the composing room which stated that the terms set out therein would become effective in the composing room on February 10. The terms, as set out in that notice, were that there would be a $35 decrease in the weekly wage rate of the composing room employees as of 7:00 a.m. on Tuesday, February 10 and that all other conditions in the expired contract would continue in effect until resolution of a successor contract. The notice further provided that Respondent required acceptance of those working conditions in writing by the affected employees no later than 1:00 a.m. on Tuesday, February 10, 1981. It advised that if written acceptance was not received by that time, Respondent will replace the affected workers for the duration of the dispute.

A similar notice had been posted in the pressroom, presumably listing the conditions under which the pressmen would be expected to work on and after February 10, 1981.

In this same period, Respondent was training guards employed by Boyd Security to take over the work of the mailroom employees/drivers in anticipation of the confrontation that would take place on February 9, as described previously. Those guards walked as a group through the composing room repeatedly. Another group of men, fewer in number, were wearing western clothes and they regularly walked through the composing room.

Singleton referred to the latter group as pressmen in the course of his testimony.

About this same time, also as noted previously, Respondent had directed T & T to relocate its office outside of the Paterson facility. Judge Sarokin alluded to that directive as a forerunner of the things to come.

The General Counsel offered uncontroverted testimony that Respondent was preparing 150 copies of a manual, which was essentially a training manual to be used by new employees in the composing room.

On February 5, 1981 an unusually large number of police officers of the City of Paterson were stationed outside the Paterson facility of Respondent. Those police officers were wearing helmets and carrying nightsticks.

It is apparent now that Respondent was then prepared to "take on the drivers" and also intent on defining the terms of employment of the composing room employees, and apparently those of the pressmen as well.

On the afternoon of February 9, Local 103's president Callahan sent the following mailgram to Singleton:

> I am using this means of communications to inform (you) as president of (Local 103) that our members will continue to work in the composing room. We will continue to negotiate in an attempt to reach agreement for a new contract unless authorized otherwise. This letter is an answer to the communications mailed to our members by registered mail.

The reference in Callahan's mailgram to communications mailed to Local 103 members was to a letter sent by Respondent to each of the composing room employees by registered mail on February 6. That letter listed the conditions contained in the notice posted in Respondent's composing room at Paterson on February 6, as related above.

On the night of February 9, as related at length above, in the section dealing with T & T, the mailroom employees/drivers were ordered out of the building in Paterson. They began to picket and carried NMDU placards. When the composing room employees arrived at the Paterson facility in order to report for work, they observed that the NMDU picket line was up and all of the composing room employees honored it.

At about 10:30 a.m. on February 10, Alessi was at Local 103's office. Singleton telephoned him there and asked why the composing room employees were not at work. Alessi told him that they were afraid to cross the picket line. Singleton stated that he had a 48 page paper to get out and that, if the Local 103 people were not back by shortly after lunch, they would all be permanently replaced and they would not be allowed back in the building again. Alessi testified that Singleton further stated that he would break off negotiations with Local 103 and that there would be no more negotiating. Alessi testified that, later that day, he received a telegram which stated that, if he did not return to work by February 11, he would be permanently replaced.

10. The February 12 meeting.

Alessi testified as follows as to that meeting. It had been scheduled at the office of the Federal Mediation and Conciliation Service. Local 103's representatives arrived on time but no one from Respondent appeared. The federal mediator made a telephone call and then told the Local 103 representatives that he had called Respondent and had spoken to John Buzzetta who stated that he thought the meeting had been cancelled. Singleton arrived two hours later and said that he was in no mood to bargain that night at all. Singleton said he had a paper to get out, that he had a strike on his hands, that he was going to be very busy and that he would be available to bargain a week from that date. Singleton

said that he had also hired some permanent replacements. When Heritage asked why Singleton did that, as Local 103 was not even on strike, Singleton responded that he was going to do what he had to do and that Local 103 can do what it has to do.

Heritage's account was substantially the same as Alessi's. Heritage also related that, before Singleton left, the mediator talked to him and that Singleton then conferred with Heritage. They agre[illegible] to meet on February 21, 1981.

Respecting the February 12 meeting, Singleton testified as follows. Because of the NMDU picket line and the fact that the composing room employees were honoring it, he, Singleton, was not sure whether the meeting would go on as scheduled. He made telephone calls to various locations trying to reach Heritage but without success. His secretary called the federal mediation office on February 12th but there was no answer. He, Singleton, assumed that at that point there would be no meeting. At about 9:30 that evening, he received a telephone call from his attorney who advised that the mediator had called and wanted to know where Respondent was. Then Singleton told his attorney that he could not come to negotiate at that hour as he was in the process of getting the paper out. His attorney called back later and urged him to go to the mediation office. Singleton agreed and got to the mediation office about 10:30 that night. He told Heritage there that, because he had not slept in three days, he was in no condition to bargain. Heritage asked if he would take the employees back if they decided to return to work the following day. When he told Heritage that he would, Heritage asked what he would do with the replacements. Singleton responded that he did not know but he assumed that they would be let go. At that point there were only five replacements hired. Singleton stated that he would be available to bargain with Local 103 anytime the following week. Heritage

advised that he could not meet Monday, Tuesday or Wednesday as he had other commitments. The mediator reported that he could not be available on Thursday or Friday. A date of Saturday, February 22, was set for the next meeting.

It is unlikely that Heritage inquired as to whether Respondent would take back the composing room employees, as Singleton's testimony would have it. Those employees were honoring the NMDU picket line and were scheduled to meet the next night to consider whether to call a strike themselves. I credit Alessi's account.

Heritage left the FMCS office on February 12 with the Local 103 representatives and went to a diner in Paterson for a meeting with officials of the NMDU and of the Pressmen's local. They exchanged notes of their respective bargaining sessions and agreed to keep each other abreast of all future negotiations.

On February 13, 1981, as related earlier, NMDU obtained from the U.S. District Court for the District of New Jersey a temporary restraining order directing Respondent to permit the mailroom employees/drivers represented by the NMDU to work in the mailroom. It then appeared that those employees would return to work that evening at their normal starting time, i.e.—about 11:30 p.m. Local 103 had scheduled a chapel meeting for 9:30 p.m. that night.

11. The February 13 chapel meeting of the composing room employees.

Alessi's account of that meeting is as follows. Heritage reported to the composing room employees present as to the negotiations on the evening of February 12 and he informed them that he did not think that Respondent was going to try to negotiate a contract with Local 103. Local 103's president Callahan then spoke. Many of the employees present wanted to know why Callahan had

only been discussing the demand by Respondent for give-backs and why no one had ever talked about the proposals put forth by Local 103. Callahan told them that he felt that the Respondent would never discuss Local 103's proposals, that it would never negotiate a contract with Local 103 and that all it was attempting to do was to threaten Local 103 and force it to give back contract gains. Alessi then conducted a strike vote; the decision to go on strike was unanimous.

12. The Local 103 picket line and Local 103's designation of NMDU officials as agents for Local 103.

Local 103's members set up a picket line outside the Paterson plant of Respondent News right after the chapel meeting ended. When the NMDU officials arrived later to see to it that the mailroom employees/drivers were allowed by Respondent to work in the mailroom, they observed the Local 103 picket line and, upon inquiring, were told by Heritage that he had been unable to reach Singleton to tell him that Local 103 would not picket if Respondent rescinded the conditions set out in its notice of February 6.

Alessi and Heritage testified as follows as to the next development. Heritage appointed Murray Schwartz, president of NMDU, Joseph Miraglia, New York business agent of the NMDU and Marshal Lippman, the attorney for the NMDU, as spokesmen for Local 103 and asked them to go into Respondent's building to negotiate for Local 103. That arrangement was made "since Singleton wouldn't answer his phone calls" and to tell him that, if the posted conditions were taken down and the permanent replacements let go, the Local 103 strike would end and that Local 103 would continue to negotiate for a contract.

Schwartz testified that he, Lippman and Miraglia went into the building and met with Singleton. Schwartz' ac-

count of that meeting is as follows. Lippman told Singleton that they were authorized by Local 103 to state that it would end its strike if Singleton would take down the posted conditions. According to Schwartz, Singleton said he could not negotiate with Lippman as the Local 103 representative and said also that he did not care if Local 103 stayed out forever as "they are never coming back to work" and that he is "not meeting with them."

Peter Trombina, vice-president of T & T, testified that he briefly observed that meeting and overheard Lippman offering to get for Singleton a written authorization from Local 103 whereby he, Lippman, would be designated as a Local 103 spokesman.

Singleton's account of that incident is as follows. Sometime around 11:30 p.m., he was told that Marshal Lippman, Murray Schwartz and other officials from the NMDU were there to talk with him. He met with them. Lippman told him that the drivers would not cross the Local 103 picket line and that Local 103 would take the picket line down if Respondent would restore the *status quo* for the Local 103 unit. Singleton informed Lippman, that he, Lippman, was not the Local 103 negotiator and that he, Singleton, would be very happy to sit down and talk with Heritage or Callahan. Callahan and Heritage had refused to meet with him, Singleton, that night. Singleton told Lippman that he did not understand why he, Lippman, was there and asked why Heritage and Callahan had not come in to talk with him as he heard that they were outside. Singleton told Lippman that he would love to talk to Heritage and Callahan to resolve the matter.

I credit Schwartz' account. Singleton's account asks me to accept the unlikely premise that Heritage on the one hand was avoiding direct discussions with Singleton and yet that he concocted an elaborate method whereby NMDU officials and its attorney were sent to see Single-

ton as Local 103's emissaries. There does not seem to be any reason why Heritage would act in so devious a manner.

After Schwartz, Lippman and Miraglia left Respondent's plant, 20 minutes or so after they had entered, they told Heritage of the discussion they had just concluded with Singleton. Local 103 has been picketing Respondent's facility since then.

In the early morning hours of February 14, 1981 Heritage returned to his motel. Singleton called him there. In the ensuing discussion, Heritage told Singleton that Local 103 would end its strike if Respondent would take down the posted conditions. Singleton said that he would not do that.

13. The February 21 meetings, with NMDU and Pressmen officials present.

Alessi testified as follows respecting the negotiations on February 21. The meeting was held at the FMCS office. Appearing on behalf of Respondent was its attorney, the publisher of Respondent News, John Buzzetta, and its director of new processes, Fred Temby. Local 103's negotiating committee was comprised of Allen Heritage, Tom Callahan, Alessi, other Local 103 members and also James Scofield, president of Local 8, Pressmen and Murray Schwartz, president of the NMDU and Joseph Miraglia, the NMDU business agent for New Jersey. Respondent's attorney objected to the presence of the NMDU officers on the ground that Respondent had a court case pending with the NMDU and did not want to prejudice its position in that matter by giving any recognition to the NMDU. Buzzetta objected to the presence also of the president of Local 8, Pressmen, James Scofield. Heritage stated that the Local 103 group was a duly constituted committee and was there to negotiate a contract for Local 103 members. As a result, there were no negotiations.

Murray Schwartz testified as follows respecting the February 21 meeting. The representatives of Local 103 sat at the table in the conference room. Schwartz, Miraglia and Scofield sat with them. They waited for Respondent's representatives to appear. When Buzzetta walked in the room, he asked what Scofield, Miraglia and Schwartz were doing there. Heritage answered that they were part of the Local 103 negotiating committee and that Local 103 has a right to appoint to that committee anyone it chooses. Buzzetta and his attorney walked out of the room for a caucus. They returned after a short while. Respondent's attorney stated that Scofield could stay but that Schwartz and Miraglia would have to leave. Buzzetta stated that he did not agree to have the Pressmen in the room either. Heritage objected to those comments and said that Local 103 had a right to have, as members of its committee, anyone it wants. The mediator ended the meeting when the matter could not be resolved. Scofield testified at the hearing before me but did not make a reference to the February 21 negotiations.

Buzzetta testified for Respondent as follows respecting the February 21 meeting. He objected at the outset to the presence of the NMDU officials as Respondent was then in a dispute with the NMDU before Judge Sarokin in the U.S. District Court. Buzzetta voiced objections initially over the presence of Scofield but later on dropped those objections. Heritage took the position that he was there with his committee and if Respondent did not want to negotiate with that committee, then Local 103 was not negotiating. Buzzetta stated that he could not negotiate with the NMDU people present.

The minutes prepared by Alessi of the February 21 meeting show that it was conducted by a federal mediator and they recite that " 'for (Local 3)—were Heritage, Callahan, Alessi, Angiuoli, Winterstain', 'For Pressmen —Jim Scofield, president', 'For New York Mailers and Drivers, Murray Schwartz (president), Joe Miraglia

(vice president)', and 'For Management—Ken Weisert (attorney), Fred Temby, John Buzzetta.'" The minutes further recite that, when Respondent's representatives objected to the presence of the officials of the NMDU and the Pressmen, Heritage stated that Local 103 would not be properly representing its people if it did not have other interested unions present. The rest of Alessi's minutes contain statements which are in general accord with his testimony.

NMDU's president, Schwartz testified, on cross examination, that he attended the meeting on February 21 under the following circumstances. He had, on February 13, expressed to Allen Heritage that he was upset with the fact that Local 103 had a picket line there that day inasmuch as the NMDU drivers had expected to return to work on February 13. Instead they honored the 103 picket line. Heritage told him then that he wanted him, Schwartz, to know what was going on and to see what was happening and to see how Respondent bargained in bad faith. Heritage told him that, at the next meeting, he, Schwartz would be invited. Shortly afterwards, he received a call from the president of Local 8 of the Pressmen's Union and was advised that the meeting was set up for February 21.

Another negotiating session, set for March 6, 1981 was cancelled by the mediator.

14. The April 28 meeting.

The next bargaining session took place on April 28, 1981. The accounts of Local 103's chapel chairman, Joe Alessi, of Respondent's attorney, William D. Toney, and of John Buzzetta, publisher of Respondent News, respecting the developments at the session are in substantial agreement. The mediator asked Local 103 to review the bargaining situation up to that date. Its representatives summarized the prior negotiations. They indicated that,

as Respondent earlier had expressed concern as to the size of the work force, Local 103 had a proposal based on a four day work week which would enable Respondent to keep the same work force but at a substantial savings of money. Thereupon, Respondent's attorney, Toney, spoke. He reviewed Respondent's proposals and then was given Local 103's proposals for a 4 day work week. Respondent then caucused to review these proposals which were contained in a typewritten document. When the parties reconvened, Toney indicated that he did not feel that job guarantees could go on in perpetuity. Local 103's representative, McGrath, stated his disagreement with that observation. Toney stated that, under the new proposal by Local 103, Respondent would have to hire 15 additional people. Thereupon Toney said that, since Local 103 had rejected Respondent's final proposal, its first proposal would be put back on the bargaining table. This provided that the unit employees would be reduced in pay 15 percent, would work a 40 hour week instead of a 35 hour week, and would lose 5 personal days. Toney said he had one additional proposal; it provided that the contractual wording as to the inclusion of foreman in the bargaining unit would be deleted as they are supervisors under the National Labor Relations Act. After a one hour caucus, there was discussion about foremen being in the unit and as to the type of work they could perform. There was further discussion of Local 103's proposal with Respondent's indicating that it was too costly a package. Alessi asked about reports that the Pressmen had given "tremendous givebacks" and wanted to know what they were. There was a caucus and Toney, upon his return, explained how the savings were effected in the Pressmen's contract. The meeting was recessed at that point.

The mediator called Respondent in May 1981 to advise that a negotiating session set during that month was cancelled.

15. The June 25 session: the alleged unconditional offer to return to work and related correspondence.

The next bargaining session was held on June 25, 1981 at the office of the federation mediation and conciliation service. The testimony given by General Counsel's witnesses thereon, through Joseph Alessi and Thomas McGrath, chapel chairman and ITU vice president respectively, together with Local 103's bargaining notes, correspond in substance with the testimony given by Respondent's witness, William Toney and its bargaining minutes. At the outset of that meeting, an official of Local 103's International gave Toney a letter dated that same day which was addressed to Dean Singleton. That letter stated that Local 103 was making an unconditional offer on behalf of all of the composing room employees to return to work immediately and it asked Respondent to advise Local 103 as to arrangements for its members to return to work. Toney stated that he needed to ask some questions to determine whether the offer was really unconditional. He asked Local 103 officials whether it was giving in to Respondent's proposals made at the April 28, 1981 session in which Respondent had sought a 40 hour work week, a $35 a week reduction in pay, a reduction of five personal days and a concession that supervisors should be excluded from the bargaining unit. ITU vice president McGrath replied that the Local 103 letter of June 25 "speaks for itself" and stated that Local 103 was making an unconditional offer to return to work. Toney stated that he wanted to know whether the picketing would cease. McGrath responded that Local 103 had no conditions and that, if Respondent insisted, it could reinstate the Local 103 members on the basis of Respondent's proposal on April 28. McGrath stated that, in that event, Local 103 members would still return to work and Local 103 would expect that negotiations would continue. Toney pointed out that replacements had been

hired for the strikers and that the strikers would be placed on a preferential hiring list. Toney stated that he was still trying to determine whether Local 103's offer to return was in fact an unconditional offer and asked if the strike would end if in fact there were no vacancies. McGrath's response was that Local 103's offer was unconditional. McGrath's testimony is that, at about that point, he had become angry. Toney characterized McGrath's demeanor as "irate". In any event, Toney asked McGrath if the picketing would stop if there were no vacancies for all the striking employees. A caucus was held. McGrath stated on behalf of Local 103 that Local 103 was not accepting Respondent's last contract proposal. McGrath added that the striking employees were offering to come back to work without a contract and to continue to negotiate. Toney asked McGrath whether Local 103 was willing to come back to work under the terms of Respondent's last offer on the bargaining table. At this point in the discussion, the exchanges were hardly cordial. McGrath asked Toney to set out Respondent's proposals in writing so that nothing is misquoted. McGrath advised that the employees on strike would be willing to go back to work under any conditions. Toney pressed McGrath as to whether the picketing would cease if none of the employees were reinstated. McGrath responded that, if all of the employees were taken back, the strike would be ended but that the picket line would stay up if some were not taken back. Toney then asked whether Local 103 was accepting Respondent's last proposals respecting wages, hours and the removal of the supervisors from the unit and if it would then be willing to bargain on the other unresolved contractual matters. McGrath stated that he thought there was agreement on all other items. McGrath stated that Local 103's position was that the striking employees were offering to go back to work unconditionally, that Local 103 was still requesting Respondent to continue to bargain for a renewal contract, that its picketing would cease when all

the strikers have been returned to work and that Local 103 does not agree to accept the Respondent's last contract proposal. At that point, the parties discussed Local 103's demand for information which was set out in a separate letter. Toney indicated that he would furnish Local 103 with whatever information it was entitled to receive and advised that he would meet sometime to look into that matter. It was agreed that Local 103 would await his reply thereon before the next negotiating session would be held.

16. Subsequent letters as to the offer to return.

On June 29, 1981 Toney wrote Local 103 to state that Local 103's letter of June 25 in which it stated that it was making an offer to return the striking composing room employees to work was not unconditional as required by law in view of the explanatory comments made by McGrath on that date. On July 7, 1981 Local 103 wrote Toney that its members are prepared unconditionally to return to work on the basis of his final proposal of February 6, 1981. Local 103 sent Toney a mailgram on July 10 which stated that the July 7 letter inadvertently left out several words and it was corrected to read as follows:

> Our members are prepared unconditionally to return to work. You are advised that such work would be on the basis of your final proposal of 2/6/81 copy of which is attached hereto.

As discussed above, Toney had told Local 103 that Respondent was putting back on the bargaining table its initial proposals made in December 1980 with a further demand that foremen be excluded from the unit. Toney then wrote Local 103 on July 17, 1981 that its offer was not unconditional as it was based on Respondent's reinstating the February 6 proposal.

On July 31, 1981 Local 103 wrote Toney and stated that he had conditioned the employees offer to return to

work by requiring Local 103 to accept Respondent's last offer of $35 per week reduction in wages and a 40 hour work week. Local 103's letter of June [sic] 31, 1981 to Toney further recited that it has placed no conditions regarding the offer to return to work. Local 103 further advised that, with regard to the picketing, it would be continued only by those not permitted to return to work or during nonworking hours. On August 3, 1981 Toney wrote Local 103 and stated that its offer has never been "unconditional" because Local 103 continued to insist that the strikers return to work on the basis of the Respondent's offer dated February 6, 1981.

Both sides apparently agree that Toney had stated at the June 25 negotiating session that Local 103's offer to return was tantamount to its accepting Respondent's proposals that there would be a $35 reduction in weekly wages and a 40 hour work week. The bargaining minutes of Respondent and those of Local 103 both reflect that Toney made that comment.

Uncontroverted evidence presented by the General Counsel established that, at the times Local 103 made its offer of reinstatement on behalf of its striking members, Respondent was advertising for composing room unit employees and that it has, since, hired a number of replacements for the striking employees. Respondent's negotiator, Toney, testified during his cross-examination, that he told Local 103 on June 25, 1981 that he had concluded and determined that there were no vacancies in the composing room then.

17. The last negotiation session—November 17, 1981.

It appears that a mediator had scheduled a meeting in October 17, 1981. Local 103 cancelled it because one of the subjects on the agenda for that meeting was a matter that Local 103 felt was one to be resolved pursuant to the grievance arbitration proceeding of the contract, and

not by collective bargaining. That matter involved Local 103's claims for vacation money and wages for personal days allegedly due employees under the terms of the expired contract. Those claims are discussed in a separate section.

On November 17, 1981, the last meeting was held at the office of the Federal Mediation and Conciliation Service. Respondent chief spokesman, William Toney, began it by stating that Respondent would restore the $35 wage cut for the second year of the contract and offer a $29.20 wage increase for the third year. He then stated he wished to set forth Respondent's proposals respecting the other areas of the contract which had not been agreed upon. He stated further that he had not had time to have a typewritten document prepared but would read to them the proposed changes from various notes he had just made. When he began to read from his notes, a discussion took place as to whether or not agreement had been already reached on points referred to by Toney. After a caucus, Toney proceeded to read from notes which, according to General Counsel's witnesses, were scattered "all over the table." During Toney's presentation, the publisher of Respondent News, John Buzzetta interjected comments. When Toney referred to the section of the contract pertaining to job guarantees, he said, "Pass." McGrath interrupted and insisted that Toney take a position on that point. Toney replied "Pass." When Toney finished his presentation, McGrath asked how could he possibly respond to it when he was not sure that the notes he wrote down reflect precisely the comments of Toney and Buzzetta. Toney responded that there was no legal requirement for him to give Local 103 a written proposal. McGrath stated that he was not going to be able to work out anything with Toney, and then changed the subject. He offered to supply Respondent with a "crew" of composing room employees for the night shift for that night. There was a heated exchange. Toney stated that

there were no openings but that he would be willing to work out a preferential rehiring list pursuant to a strike settlement agreement which would be for 6 months with the provision that the employees on the list would have to notify Respondent once a month by registered mail that they were available to work. The agreement would further provide, according to Toney's proposal, that at the end of 6 months, if the striking employees were not back to work it was "all over." McGrath asked Toney to put that in wirting for him and Toney responded he would consider that request. The parties separated. McGrath told the mediator that he needed everything in writing. The mediator informed McGrath, when McGrath said he needed the Respondent's position respecting the guaranteed job clause in the contract, that Toney would consider agreeing to that clause if Local 103 would agree to the rest of the contract. The mediator left the room and returned. He then advised McGrath that Toney would put all the contract changes in his proposal in writing as soon as he got back to his office and that he would include three dates for future bargaining. The meeting ended. Local 103 has heard nothing from Respondent since respecting negotiating for a renewal contract.

D. Analysis—alleged bad faith bargaining.

Respondent and Local 103 had worked together harmoniously for many years in modernizing the composing room operations with a view towards accommodating the interests of the unit employees. In the fall of 1980, Local 103 pushed forward with its campaign to organize Respondent's editorial employees, at a time when Respondent was continuing to experience financial losses in its operation, especially those of Respondent News. The credited evidence is that Singleton then said he intended to punish Local 103 for that effort and that the composing room employees would get no raise. The discriminatory discharges of eight reporters in October 1980, as found above, underscores that statement.

Respondent initiated the discussions for a renewal contract. There is no question but that it fulfilled its obligation to meet with Local 103 at reasonable times and to discuss with it relevant contract matters. What stands out to me is that, in the negotiations from December 2, 1980 to February 6, 1981, Respondent aimed at one goal —a substantial giveback by the employees represented by Local 103. When asked for its "bottom line" it modified that demand but made it clear that it wanted $35 per week per unit employee back. There is no question in my mind that Respondent was willing to enter into a renewal contract on the basis of its proposal. It pressed Local 103 to get an International representative to the bargaining table for that purpose. Were that all there were to this case, I would conclude that Respondent met with Local 103 at reasonable times and places, discussed its proposals, offered counterproposals, properly claimed it was losing money and indicated it would substantiate that claim but was not asked to do so, and otherwise discharged its obligation to bargain collectively. However, I do not think those matters should be viewed in isolation. A significant point for consideration is Singleton's threat that he would roll right over Local 103 if it did not accede to his demands. I also attach weight to the credited testimony that he wanted the $35 giveback without any ifs, ands or buts. Buzzetta, too, had earlier stated that Respondent would stick to its proposals, no matter what. Very significant for me also is the credited testimony that Singleton had said that if he did not get his way on the givebacks, the composing room employees would no longer work for Respondent.

The discussions between Respondent and Local 103 were not conducted in the abstract. It must be remembered that Singleton had, since the early fall of 1980, been in the process of "taking on" the mailroom employees/drivers and when the adverse arbitration award came down in mid-January, 1981, he voiced that very sentiment. He did take them on. Just three days after that award

issued, he gave Local 103 Respondent's bottom line, a $35 weekly wage giveback to achieve a $91,000 savings in composing room operating costs—by itself, an obviously permissible bargaining goal.

The General Counsel sets out two concepts on which I am urged to find that Respondent engaged in bad faith bargaining. First, it is contended that Respondent entered into the bargaining and pursued it with a fixed intent to go through all the motions but with no real intent to reach agreement except on its own terms. Secondly, it is urged that, even if surface bargaining were not shown, Respondent cannot have given Local 103 a fair chance to bargain before it unilaterally imposed the $35 giveback. I am not sure that the bad faith bargaining issue in this case can be resolved on such a bifurcated approach. It would be simplistic to decide the merits on the basis of whether or not an impasse was reached before a contract change was implemented. I cannot see how I can consider that matter apart from General Counsel's basic contention that, from the outset, Respondent's mind was unalterably fixed. If so, the impasse was reached and evidenced at the second bargaining session when Buzzetta brushed aside Local 103's demands and disclosed that Respondent was set on its giveback goals.

It would be equally simplistic too to decide the merits on the basis urged by Respondent as that approach puts too much emphasis on the mechanical aspects of bargaining. There is no real question in my mind that Respondent suffered operating losses as to the *News* and the *Dispatch*, that Local 103 could have easily verified that fact if it wanted to do so or that Respondent wanted a prompt resolution on its demands whereas Local 103 was maneuvering to avoid or to delay the giveback sought by Respondent. To write *finis* to General Counsel's case on the basis of those observations misses the issue.

There is on the one hand, as noted before, clear evidence of *animus* by Respondent, in and about the bargaining.

There are, on the other, the economic facts which support strongly Respondent's demand for givebacks and the open efforts it has made to reach an agreement with Local 103. What I find significant are factors that motivated Respondent in its bargaining that should not have been there. Very simply, Respondent's bargaining approach with Local 103 appears to have been materially influenced by its intent to "take on" the NMDU. Respondent spent far more than the giveback it wanted from Local 103 in preparing to take on the NMDU and in doing so. Maybe it was entitled to do so but the expenditure of such large sums does not lend credence to Respondent's assertion that it needed the $91,000 giveback from Local 103 to keep the paper going for one more year. The sudden demand by Respondent on February 6 that the Local 103 members advise it in writing by February 10 as to whether they would work under the posted conditions is, in my view, very much bound up with Respondent's actions *vis-a-vis* the mailroom employees/drivers the night of February 9, as recounted in detail above. Respondent had a meeting set with a key ITU official for February 12 but did not wait for him. Rather, it was incurring large expenses in housing and training the Boyd Security guards. Strangely, it seems that Respondent's varying proposals to Local 103 indicate that its bargaining was not genuine good faith. On February 6, it gave Local 103 two typewritten proposals. The first was a three year proposal with a raise in the third year. When Local 103 said it would consider it, it was given the second—providing for the $35 giveback and a requirement that the employees provide written assurances that they will work on that basis.

I find from the totality of the relevant evidence that it is more probable that Respondent negotiated with Local 103 with a fixed intent to force Local 103 to give back $35 in wages and that it never seriously considered any alternative. I thus find that the General Counsel has

established by a preponderance of the evidenec that Respondent did not bargain in good faith with Local 103.[34] I further find that Respondent's conduct after the start of the Local 103 strike underscored the fact that Respondent rejected the principle of collective bargaining. Then, Singleton told Schwartz on February 13 that Local 103 members on strike "are never coming back to work"; Toney professed on April 28 to be unable to understand the words "unconditional offer"; as found below, Respondent unlawfully sought to have Local 103 decertified.

E. Analysis as to alleged unlawful refusal to reinstate the striking composing room employees.

As the composing room employees voted to strike because of Respondent's bargaining tactics and as I have found that that bargaining was conducted in bad faith by Respondent, I furhter find that the strike by the composing room employees on and since February 13, 1981 was caused and prolonged by Respondent's unfair labor practices.[35]

The evidence is also quite clear that Local 103 made repeated offers on behalf of those employees since June 25, 1981 to return to work. Respondent urges that those offers were not unconditional as Local 103's mailgram in July indicated that the employees would return on the basis of the conditions on February 6, 1981. Local 103's subsequent dealings thereon with Respondent made it unequivocally clear that its offer to return was unconditional; yet Respondent insisted that Local 103's offer was oased on the terms of the notice posted by Respondent, which they had rescinded as a contract proposal on April 28, 1981. I note that Respondent offered no evidence to

---

[34] *Wal-lite Division of United States Gypsum Co.*, 200 NLRB 1098 (1972).

[35] *Billion Motors, Inc., d/b/a Billion Oldsmobile-Toyota*, 260 NLRB No. 99 (1982).

show that the replacements were working under terms other than those set out in the February 6 notice.

I find that Toney's persistent requests to "clarify" the stated unconditional offer were undertaken to find some reason to reject it. If there were any real doubt that the offer was not unconditional, Respondent could have tested it by calling some of the strikers back as there were openings. It chose brinksmanship. At that, it was consistent with its announced determination that those striking employees would "never (be) coming back to work", that they "would be out there (on strike) a long time because they are never coming back" and that Respondent "would appeal all the way to the Supreme Court to keep (Local 103) out."

I therefore find that Respondent's refusal to honor Local 103's unconditional requests on behalf of the striking composing room employees to return to work on and since June 25, 1981 was discriminatorily motivated.[36]

F. Analysis: alleged unlawful refusal of Respondent to negotiate with Local 103 based on the composition of its negotiating committee.

Local 103 designated NMDU president Schwartz as one of its representatives on February 13 and again on February 21, 1981. On both occasions Respondent refused to negotiate because Schwartz was not an official of Local 103. Respondent asserts that it was privileged to do so in view of its assertions that Schwartz had engaged in misconduct on February 9, 1981. That is obviously an afterthought as that reason was never given on either February 13 or 21. Respondent contends that it also could

---

[36] *Billion Motors etc., supra.* Even were the strike by those employees not caused or prolonged by Respondent's unfair labor practices, I would make the same finding as there were job openings and as in any event Respondent rejected the offer on a frivolous, pretextual basis.

not sit down with Local 103 in Schwartz' presence as it would thereby be according recognition to NMDU's claim in the U.S. District Court proceeding then that Respondent was the employer of the mailroom employees/drivers represented by NMDU. That reason is also without merit as Singleton met directly with Schwartz on February 26, 1982 about that group.

Respondent's refusal to negotiate with Local 103 because Schwartz was on its negotiating committee, in the circumstances of this case, improperly impinged on Local 103's right to bargain collectively with Respondent and constituted a violation of Respondent's duty to bargain in good faith.[37]

G. Analysis: alleged unlawful threats and warnings.

The General Counsel contends that Respondent "displayed" strike replacements in late January and early February 1981 and thereby unlawfully warned the composing room employees of the futility of the attempts of Local 103 to bargain collectively with Respondent. Those individuals so "displayed" were for the most part Boyd Security guards being trained by Respondent to replace the mailroom employees/drivers who, as found above, were not Respondent's employees. As Respondent could sever its contract with T & T without violating the Act, its training of those guards to that end would necessarily be in furtherance of a lawful aim. The possibility that some of Respondent's employees may incidentally have been influenced by that act does not thereby violate their rights under Section 7.[38]

The threats by Singleton to discharge employees or to replace them if Local 103 did not accede to his demands and his threat to refuse to continue bargaining if the

---

[37] *Harley Davidson Motor Co., Inc., HME AMF*, 214 NLRB 433, 437 (1974).

[38] Cf. *Trash Removers, Inc.*, 257 NLRB No. 139 (1981).

composing room employees honored the NMDU picket line were not incidental matters but direct impairments of employee Section 7 rights.

Incidentally, the complaint alleged, as independent violations of Section 8(a)(5), the October 22, 1981 warning by Laciura, the threat of discharge by Laura, the layoff of eight reporters in October, 1981, the discharge of Rim and Macaluso, the refusal to reinstate the composing room employees on strike and the lawsuit against those strikers as discussed below. As parties cannot be required to bargain collectively about unlawful acts, I fail to see how those warnings etc. separately can violate Section 8(a)(5).

H. Alleged unlawful refusal to honor Local 103's claims for striking employees' accrued vacation pay and accrued wages for unused personal days.

The General Counsel contends that Respondent has unlawfully withheld from striking employees their vacation monies and wages for personal days accrued under the expired contract. The General Counsel separately contends that Respondent unlawfully has failed and refused to agree to arbitrate Local 103's grievances respecting those claims. Respondent asserts that the amounts of monies due employees for accrued vacation pay and for personal days are payable at the end of each year and depend upon their rate of pay as of the time they are paid and not in accordance with the amount of their wages in the last year of the expired contract. Thus, Respondent asserts that Local 103's claims for vacation pay and personal days were premature and were matters for contract negotiations, not for the grievance arbitration procedure under the expired contract.

On August 10, 1981, Local 103's president, Callahan, wrote to Respondent asking that it pay monies owed its members for vacation pay and that such monies should be paid in accordance with the agreement under which Local 103 members worked until February 10, 1981. On Au-

gust 12, 1981, Callahan wrote essentially the same type letter to Respondent for payment of unused personal days due Local 103 members pursuant to the contract in force at the time of the strike.

The contract between Local 103 and Respondent News effective January 25, 1976 to January 24, 1981 provided for various vacation benefits, depending upon length of service. Article II, Section 22 of that agreement provides that pay for vacation shall be at the rate the employee is receiving at the time the vacation is taken. Article II, Section 27 provides that each unit employee shall receive 10 personal days each year and that days not used shall be paid for at the rate of scale of the shift of the employee by no later than December 31 of the following year.

On September 10, 1981, William D. Toney, then chief spokesman for Respondent, answered those letters of August 10 and 12 and stated that Respondent has no way to determine what rate of pay should be used to satisfy those claims. He asserted too that the claims were premature as payment, in his view, was not due until the end of 1981. Toney observed that, as Respondent and Local 103 have not reached agreement respecting the wages of the unit employees' wages, Respondent must deny the claims. On October 2, 1981, Callahan wrote Toney and asked a series of questions of him, eight in number. On October 13, Toney responded and in effect stated that Local 103 was evading the issues. He noted that Local 103's letter of October 2, referred to sick days' payments and that that claim had never been raised. By letter of October 15, 1981, Callahan wrote Respondent for a meeting of the "joint standing committee" as provided for in the expired agreement to handle the unresolved questions of payment of vacation pay and personal days. Toney responded to that letter by writing Local 103 on October 21 to reiterate that the matters of vacation pay and personal days are properly ones for collective bar-

gaining, not for grievance—arbitration. Toney also noted, under the terms of the expired agreement, payment for personal days does not accrue until December 31, 1981 and, on that basis, he observed that Local 103's request for payment of personal days was premature. On November 4, 1981 Local 103's attorney wrote Toney to advise that Local 103 would be present at the federal mediation office on November 17 to conduct the joint standing committee meeting before getting into negotiations on that date. Toney responded by telegram to advise that the November 17 date had been reserved for contract negotiations and not for a joint standing committee meeting. On November 17, Toney and Local 103's representative agreed to handle the contract negotiations on that day and to defer the discussion as to Local 103's claim for vacation monies and personal days. On November 25, Local 103's attorney wrote the American Arbitration Association requesting that it send a list of arbitrators, from whom the parties could select one to resolve the issues arising out of Local 103's claims for vacation pay and personal days pay. By letter dated December 1, 1981, Toney wrote the American Arbitration Association to oppose Local 103's request for arbitration on the ground that the expired contract does not provide for arbitration of the bargainable items. By letter dated December 11, 1981, Local 103's attorney wrote the American Arbitration Association to advise that the issue Respondent raised is one that itself is arbitrable and which Respondent can raise before the designated arbitrator.

Testimony was offered before me that the parties were arbitrating those matters.[39]

Implicit in General Counsel's first contention, i.e.—that Respondent unlawfully failed to pay accrued benefits, is

---

[39] In its brief Respondent stated that the award issued in that proceeding. It is not appropriate for me to accept that representation or to consider the other comments in Respondent's brief as to such an award.

that the calculation of the amounts due and the date that payment thereof is to be made are both matters that involve essentially contract interpretation, which in my view is best left to the arbitral process.[40] I find persuasive General Counsel's alternate contention—that Respondent cannot lawfully resist arbitration on the ground that the wage rates involved are subject to bargaining while it was simultaneously failing to bargain thereon in good faith. Respondent thereby penalized its employees because they supported Local 103's aims.[41]

I. Alleged unlawful suit by Respondent against striking employees.

The essential facts are not in dispute.

In March 1981 the composing room employees on strike discussed among themselves the fact that, in prior years, various employees of Respondent had obtained awards in worker compensation cases based on lung and chest ailments traceable to exposure at work over the years to asbestos, lead and noxious fumes. Many of those striking employees met, in groups of three or more, with Local 103's attorney to consider whether they should pursue similar claims. Fifty-one of them elected to do so and each signed his own workers' compensation petition alleging that he incurred a permanent, partial disability based on long time exposure at work to lead etc. The publisher of Respondent News, John Buzzetta, testified that the moment he learned of those petitions he called a local attorney to have a suit started.

---

[40] Cf. *Collyer Insulated Wire, A Gulf and Western Systems Co.*, 192 NLRB 837 (1971).

[41] Cf. *Vesuvius Crucible Company*, 252 NLRB 1279 (1980). As discussed in the Remedy section, no affirmative relief is provided in view of the ongoing arbitration proceeding. Were that proceeding not undertaken, the Board would have the ancillary power to interpret the contract to adjudicate in full the unfair labor practice issue.

On November 25, 1981, Respondent filed a complaint to institute a civil action in the Superior Court of the State of New Jersey. Each of the striking composing room employees was named as a defendant in that suit. Each was alleged therein to have conspired to file the worker's compensation claim to harass Respondent and, based on various counts alleging civil conspiracy, abuse of process and fraud, Respondent sought from each striking employee compensatory and punitive damages and attorney's fees and costs.

On December 10, 1981, Respondent amended that complaint to delete the names of those striking employees who had not filed any worker's compensation petition.

Local 103's attorney filed answers on behalf of each of the defendants. As of the hearing in the instant case, that suit was in its pre-trial stage.[42]

The General Counsel asserts that the employees who filed workers compensation petitions in 1981 were thereby engaged in a concerted activity protected by Section 7 of the Act and that Respondent's suit against them unlawfully interfered with the exercise of that right. Further, General Counsel asserts that Respondent did not act in good faith in bringing that suit as it initially sued all the strikers and not just those who had filed workers compensation petitions.

Respondent asserts that *en masse* filing of such petitions where no objective medical data was offered to support them constituted a *prima facie* tort and that Respondent pursued that claim in good faith.

---

[42] In its brief, Respondent made a statement as to developments in that case since the hearing closed in the instant case. Counsel for Local 103 then filed a motion seeking to place in evidence certain papers in that lawsuit which he asserted reflected more accurately the status of that case. Counsel for Respondent filed a response. As best as I can ascertain, certain counts of the complaint in the Superior Court civil action were dismissed and others were held to be sufficient under New Jersey law to warrant further proceedings.

The Board has held that the filing of workers' compensation petitions is an activity protected by Section 7 of the Act.[43] It would seem that the lawsuit against the employees who filed workers' compensation petitions in the instant case had to interfere with and restrain them in the exercise of that right. The Board's approach is to nevertheless permit such interference with that right, in view of the "right to all persons to litigate their claims in court." [44] In proper cases, however, the Board may act to curb a suit which has the potential for chilling protected rights.[45] The General Counsel urges that the instant case is one where the Board should act. I agree. The institution of the civil action initially against all striking employees and not just those who filed worker compensation petitions discloses Respondent's real motivation and that was underlined, in my view, by the fact that Respondent directed the filing of such an action immediately upon the filing of the petitions. In making that determination, I also have taken into account the off-stated remarks by Respondent demonstrating its intent to penalize Local 103 for its activities among Respondent's employees.

J. Alleged promises to encourage Local 103's decertification.

The General Counsel contends that, on about July 1, 1981, Respondent, by its supervisor Lawrence Brocklesby, promised benefits to employees to induce them to decertify Local 103 as their bargaining representative. In support of that allegation, the General Counsel called as a witness Steven Thompson. He testified as follows. He had been hired as a composing room employee in February 1981 on a permanent basis. In June 1981 he had three con-

---

[43] *Krispy Kreme Doughnut Corp.*, 245 NLRB 1053 (1979) enf. den. 635 F. 2d 304 (4th Cir. 1980) at fn. 4.

[44] *Clyde Taylor Company*, 127 NLRB 103 (1960).

[45] *Bill Johnson's Restaurant*, 249 NLRB 155, 164 (1980).

versations with his supervisor Lawrence Brocklesby. Those conversations took place in Brocklesby's office and no one else was present at any of them. In the first conversation, he asked about raises, seniority and other benefits and Brocklesby informed him that he would get back to him. At the second conversation, he asked again about those benefits and was told once again that Brocklesby would get back to him. Several days later he again spoke to Brocklesby and asked if he was covered by the Local 103 contract. During that discussion, Brocklesby told him that if he, Thompson, would file a petition to decertify Local 103, Respondent could get rid of it before the latter came to court sometime in January. During that discussion, Brocklesby told him that he, Thompson, had to get more than half the people that he worked with to do away with Local 103 and that Respondent could then give employees pay raises and benefits and a better working environment.

Thompson was discharged by Respondent in late August 1981. On November 25, 1981 he gave an affidavit to an agent of the Newark office of the National Labor Relations Board and on November 30, 1981, filed the charge in Case No. 22-CA-11313. That charge gave rise to the allegation in the complaint before me respecting the alleged promise of benefit by supervisor Brocklesby. Thompson had filed another charge with the Newark office of the National Labor Relations Board alleging that his discharge in late August 1981 was unlawful. He signed an affidavit respecting that matter on January 16, 1982 which revealed that in his work history he had been fired and reinstated on four previous occasions by Respondent before his final termination in August 1981. That charge had been dismissed by the Regional Office for insufficient evidence.

On cross-examination, Thompson gave testimony which was confused about dates on which he had filed unfair labor practice charges. At one point, he indicated that he

believed he had filed his first charge in August 1981 and as it turned out he was partially right. He had signed an unfair labor practice charge which was date stamped in August 1981 but, for some reason, it had not been docketed; instead, it was incorporated in another case file in the Board's regional office.

Respondent called Lawrence Brocklesby to testify respecting this allegation. Brocklesby related that he had had many discussions with Thompson pertaining to Thompson's work deficiencies. He said that Thompson had not really "made any complaints other than to say he wanted more money and did not like the idea of working Sundays." He was asked on direct examination whether he had any conversations with Thompson about the decertification of Local 103 and responded "never." On cross-examination he stated initially that he did not recall any conversation with Thompson where the issue of the Local 103 contract with Respondent News was brought up. When the matter was pursued, he testified that he took the Local 103 contract from Thompson in June 1981, put it in his desk without reading it and told Thompson that he would have to talk with Respondent's lawyers or with Buzzetta, the publisher of Respondent News. He acknowledged further that Thompson had asked him whether the employees under Brocklesby were covered by that contract and he told Thompson that he did not know and that Thompson would have to talk with the "lawyers and Mr. Buzzetta." He stated further that he did not remember whether he glimpsed at the first page of that contract and then stated he might have glanced at it and then thought he remembered that it was a Local 103 contract. Later on, he stated that Thompson threw that contract at him and that was why he did not read it. Then Brocklesby stated that Thompson threw the contract on the desk.

I credit Thompson's account. He testified in a straightforward manner as to the remarks made by Brocklesby to

him in June 1981 about having Local 103 decertified. Brocklesby on the other hand testified on direct examination that the only discussion he had with Thompson were [sic] about Thompson's work deficiencies, about getting more money and about not working on Sundays. On cross examination however he testified that Thompson tried to provoke an argument with him by throwing the Local 103 contract at him. Significantly too, the testimony adduced from Brocklesby on cross examination respecting discussions about the Local 103 contract corroborated Thompson's testimony. In view of the foregoing, and as it appears that Brocklesby's testimony respecting his discussions with Thompson on the Local 103 contract contradicted his initial denial respecting any such conversations, I do not credit Brocklesby's summary denial when he was asked whether he had any conversations with Thompson about decertifying Local 103.

Based on the foregoing credibility resolution, I find that Respondent, by Brocklesby, promised benefits to its employees to induce them to decertify Local 103 as bargaining agent of the composing room unit.

Conclusions of Law

1. Respondent News, Respondent Dispatch, Respondent Allbritton and T & T are each an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Respondent News, Respondent Dispatch and Respondent Allbritton, (herein jointly called Respondent), constitute a single employer within the meaning of the Act and that all three are liable for the unfair labor practices found in this case.

3. Local 103 and NMDU are each a labor organization as defined in Section 2(5) of the Act.

4. Respondent is not a joint-employer with T & T of the mailroom employees/drivers in this case and thus did

not unlawfully fail or refuse to bargain collectively with their representative, NMDU, or unlawfully lock them out, or unlawfully permanently replace them, or unlawfully refuse to reinstate them, or unlawfully withdraw recognition from NMDU or violate Section 8(a)(1)(3) or (5) of the Act respecting the mailroom employees/drivers.

5. Respondent, by the warning given by Laciura, by the threats of discharge by Laura and Singleton and by the promises made by Brocklesby to induce an employee to act to decertify Local 103 and by the violations found below respecting Section 8(a)(3) and (5) of the Act, Respondent interfered with, restrained and coerced, and is interfering, restraining and coercing its employees as to their rights under Section 7 of the Act and thereby has violated Section 8(a)(1) of the Act.

6. Respondent discharged its employee, Dale Rim, because he refused to perform work normally done by Local 103 members on strike and Respondent thereby interfered with, restrained and coerced him with respect to his right under Section 7 of the Act to refuse to perform such work and Respondent thus violated Section 8(a)(1) of the Act; and because Respondent sought to discourage membership in Local 103, it thereby violated Section 8(a)(3) of the Act.

7. Respondent did not, by its discharge of Charles Macaluso from its employ, violate Section 8(a)(1), (3), (4) or (5) of the Act.

8. Respondent did not unlawfully parade or display striker replacements to signal to Local 103 members that any strike activity on their part or any further bargaining efforts by Local 103 would be futile and the complaint allegation thereon must be dismissed.

9. The composing room employees employed by Respondent have been engaged in a strike since February 13, 1981 which has been caused and prolonged by unfair labor practices committed by Respondent.

10. Local 103 has, on and since June 25, 1981, unconditionally requested Respondent to reinstate to employment the striking composing room employees and Respondent's failure and refusal since June 25, 1981 to honor those requests have discriminated against those employees in order to discourage them from continuing to support Local 103 and Respondent thereby violated Section 8(a)(3) of the Act.

11. Respondent laid off eight reporters in October 1980 and has failed to reinstate six of them in order to discourage its employees from joining or supporting Local 103 and Respondent thereby has violated Section 8(a)(3) of the Act.

12.(a) Respondent violated Section 8(a)(3) and (5) of the Act by having delayed unduly the processing of Local 103's grievances as to vacation pay and wages for personal days it claims are due to composing room employees as such delay was aimed at discouraging its employees from supporting Local 103 and as it was in derogation of Respondent's duty to bargain collectively with Local 103.

(b) Respondent did not unlawfully fail or refuse to honor those claims when presented as the amounts due and the due dates were best left to the arbitral process.

13. Respondent instituted and has prosecuted a civil action against its composing room employees because they supported Local 103 and to discourage them from pursuing their respective claims under the Workers Compensation Act and Respondent thereby has interfered with, restrained and coerced its employees respecting their rights under Section 7 of the Act and in violation of Section 8(a)(1) of the Act. However, as Respondent and Local 103 were under no duty to bargain them, Respondent did not thereby violate Section 8(a)(5) of the Act.

14. All composing room employees, including data processing and technical service employees employed by Respondent at its Paterson, New Jersey plant but excluding all other employees, guards and supervisors as defined in the Act constitute a unit appropriate for purposes of collective bargaining under the Act.

15. Respondent has failed and refused to bargain collectively, as defined in Section 8(d) of the Act, with Local 103 as the exclusive representative of Respondent's composing room employees and thereby violated Section 8(a)(5) of the Act.

16. All full-time and regular part-time editorial employees employed by Respondent at its Paterson and Union City plants, including editors, reporters, writers, chief photographer (Dispatch), photographers, librarians, desk assistants, typists and rewrite persons but excluding the executive editor, managing editor, associate editor, city editor, metropolitan editor, executive sports editor, sports editor emeritus, contract service for racing, Spanish editor, photo editor, office clerical employees, confidential employees, including the secretary to the executive editor, professional employees, guards and supervisors as defined in the Act and all other employees constitute a unit appropriate for collective bargaining within the meaning of the Act.

17.(a) It is appropriate that Respondent bargain collectively from October 24, 1980 with Local 103 as the exclusive representative, for purposes of collective bargaining, of the employees in the unit described above in paragraph 16.

(b) Respondent has failed to bargain collectively with Local 103 since on and after it received Local 103's demand and thereby violated Section 8(a)(5) of the Act.

18. It is also appropriate for reasons discussed under the Remedy section, to issue a broad remedial order against Respondent.

19. Respondent did not violate Section 8(a)(1) of the Act by the allegedly unlawful display of strike replacements or its allegedly unlawful threat to replace employees if they engaged in a strike or its allegedly unlawful threat to refuse to bargain with Local 103.

20. Respondent did not violate Section 8(a)(5) of the Act by discharging eight reporters in October 1981, by discharging Dale Rim or Charles Macaluso, by warning or threatening employees, by its failure to reinstate unfair labor practice strikers on their unconditional application therefor, by its refusal to pay claims for vacation pay and for pay for unused personal days or by having instituted and prosecuted a lawsuit against striking composing room employees as Respondent and Local 103 had no obligation to bargain as to such threats, discriminatory discharges and so on.

21. Respondent, as it is not a joint employer with T & T of the mailroom employees drivers did not violate Section 8(a)(1)(3) or (5) of the Act as alleged in paragraphs 32, 35, 36 or 38 of the amended complaint.

22. The unfair labor practices above whereby Respondent was found to have violated Section 8(a)(1), (3) or (5) of the Act, affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

Respondent shall be required to offer to the six reporters laid off in October 1980, who have not been recalled, immediate and full reinstatement to their former position or, if those positions no longer exist, to substantially equivalent positions without prejudice to seniority or any other rights and privileges and Respond-

ent shall make all eight reporters whole for any loss of earnings they may have suffered as a result of their having been laid off by payment to each of them of a sum of money equal to which each, respectively, would have earned but for being laid off, less net earnings, to be computed on a quarterly basis in the manner set forth in *F.W. Woolworth Company*, 80 NLRB 289 (1950), and with interest thereon computed as prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[46]

Respondent shall offer reinstatement to Dale Rim on the same basis and similarly make him whole and Respondent shall expunge any reference to his discharge from its personnel file and so notify him.[47]

Respondent shall offer to each of the employees who began a strike on February 13, 1981, immediate and full reinstatement to the jobs they held immediately before February 13, 1981, or if those jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or any other rights or privileges previously enjoyed, discharging, if necessary any replacements hired in their places, and make the striking employees whole for any loss of earnings they may have suffered by reason of the discrimination against them by paying them backpay from and after the date they unconditionally offered to return to work, computed on a quarterly basis in the manner established by the Board in *F.W. Woolworth Company*, 90 NLRB 289 (1950), and with interest thereon computed in the manner prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[48]

---

[46] See generally *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[47] *Sterling Sugars, Inc.*, 261 NLRB No. 71 (1982).

[48] *Isis Plumbing & Heating Co., supra.* As Respondent rejected the offer, backpay shall be calculated from the date of the offer, June 25, 1981. See *International Business Systems, Inc.*, 258 NLRB No. 17 (1981).

Respondent shall, upon Local 103's request, cancel any change in the rates of pay, hours, wages or other terms or conditions of employment of its composing room employees made on or after February 10, 1981 and shall reinstate such rates of pay, hours, wages and other terms and conditions of their employment as existed prior to that date but this shall not be construed as requiring Respondent to reduce any rates of pay, wages or any benefit without a request thereon from Local 103.[49]

As discussed earlier in this decision, a *Gissel* bargaining order shall issue to Local 103, effective October 24, 1980 as representative of the editorial employees of Respondent.

Respondent shall be ordered to withdraw the complaint, and amendments thereto, that it filed with the Superior Court of New Jersey against the composing room employees and shall reimburse them for all legal fees, expenses and costs they incurred in defending that matter.

To insure that all affected employees are made aware of their rights, Respondent shall mail to each of its employees on strike a copy of the Notice to Employees attached hereto, in addition to posting copies of that Notice, as provided for herein.

General Counsel's request for extraordinary relief, including a request that Respondent's official read to the employees the provisions of the attached Notice, is denied as unduly cumulative.

However, Respondent's proclivity to violate the Act and the fact that it demonstrated a general disregard for employees' fundamental statutory rights warrant broad injunctive relief.[50]

---

[49] See *Gardena Buena Ventura, Inc., d/b/a Alondra Nursing Home and Convalescent Hospital*, 242 NLRB 595 (1979).

[50] *Hickmott Foods, Inc.*, 242 NLRB 1357 (1979).

Upon the foregoing findings of fact, conclusions of law and upon the entire record, and pursuant to Section 10(c) of the Act, I issue the following recommended:[51]

ORDER

I. Respondent Allbritton Communication, Inc., Respondent News Printing Company, Inc. and Respondent Hudson Dispatch, jointly and severally, as a single employer, by their officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) warning employees against discussing, or signing authorization cards for, Newark Typographical Union No. 103, International Typographical Union, AFL-CIO (herein called Local 103);

(b) threatening to discharge employees if they support Local 103;

(c) threatening to discharge or replace employees to force Local 103 to give in to Respondent's bargaining demands;

(d) threatening to refuse to bargain with Local 103 to discourage employees from honoring a lawful picket line;

(e) promising benefits to encourage employees to solicit other employees in order to have Local 103 removed as bargaining agent of Respondent's composing room employees;

(f) laying off employees to discourage support for Local 103;

---

[51] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(g) discharging employees because they support Local 103 by having refused to perform work normally done by striking composing room employees;

(h) refusing to reinstate unfair labor practice strikers upon their unconditional offer to return to work;

(i) delaying unduly the processing of Local 103's grievances in order to discourage employees from supporting Local 103 and in derogation of Respondent's duty to bargain collectively with Local 103;

(j) instituting lawsuits against employees to discourage them from filing petitions for workers' compensation and to discourage them from supporting Local 103;

(k) failing to bargain collectively with Local 103 as the exclusive representative of the unit of employees described as follows:

All full-time and regular part-time editorial employees employed by Respondent at its Paterson and Union City plants, including editors, reporters, writers, chief photographers (Dispatch), photographers, librarians, desk assistants, typists and rewrite persons but excluding the executive editor, managing editor, associate editor, city editor, metropolitan editor, executive sports editor, sports editor emeritus, contract service for racing, Spanish editor, photo editor, office clerical employees, confidential employees, including the secretary to the executive editor, professional employees, guards and supervisors as defined in the Act and all other employees constitute a unit appropriate for collective bargaining within the meaning of the Act.

(l) failing and refusing to bargain collectively with Local 103 as the exclusive representative of the unit of employees described as follows:

All composing room employees, including data processing and technical service employees employed by Respondent at its Paterson, New Jersey plant, but excluding all

other employees, guards and supervisors as defined in the Act, constitute a unit appropriate for purposes of collective bargaining under the Act;

(m) failing and refusing to deal with individuals designated by Local 103 as its agents for purposes of collective bargaining for the employees in the unit described above in sub-paragraph (1);

(n) reducing wage rates of the employees in that unit without bargaining collectively thereon with Local 103;

(o) in any other manner, interfering with, restraining or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which I find necessary to effectuate the polices of the Act:

(a) Offer Jack Fischer, Ron Dohl, Patrick McDonnell, Lisa Rubin, John Ensslin, Margaret Vogel, Dale Rim and all of the composing room employees who have been engage in an unfair labor practice strike and on whose behalf Local 103 unconditionally applied for reinstatement, including those named below:

Joseph Robert Alessi
Anita Angiuoli
Vincent Angiuolo
Gerald J. Beck
Louis A. Biscaldi
Angelina A. Brandt
Warren Butterworth
Carol M. Cardaci
Harold Casowitz
Jorge E. Chapelli
Roy Christmann
Jean Ciarlegio
Thomas J. Condon
Americo D'Auria
Arthur De Boer
Philip J. DeNardo
June Rae Fiduccia
John Joseph Finnegan
Carmen Fracasso
Edward J. Gavin
Fred W. Goddard Jr.
George R. Hellar
Engel U. Hoff
Eugene A. Jackson
Madeline L. Kelly
Robert Kester
Robert D. Klein
Harold R. Knipe Sr.
Frank Kuryla
Gerald E. Mathes

Edward Mutch	Martin Schweighardt
Arthur S. Paskey	Joseph A. Sidoti
Leonard L. Pelonero	Suzette Rosaria Soler
Charles A. Popowski	John Strange
Theresa Ann Recca	Keith A. Stuthridge
Mario Roefaro	Walter Ulinski
Ira Stuart Samson	Nicolo Vitrano
Joseph Scarmazzo	Ronald Winterstein
Robert Schroeck	Mary Zweibel

immediate and full reinstatement to their former jobs or if they no longer exist, to substantially equivalent employment without prejudice to minority, or other rights or privileges and to make them and David Neustadt and Richard Goldensohn whole for any lost earnings they suffered, in the manner provided for in the Remedy section, above;

(b) take the requisite procedural steps under the laws of the State of New Jersey to discontinue prosecuting the lawsuit against its composing room employees and reimburse them for all legal fees, expenses and costs they incurred as a result of being named defendants in that suit;

(c) recognize, effective October 24, 1980, and upon request, bargain collectively and in good faith with Local 103 as the exclusive representative of the unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody it on Local 103's request in a written agreement and to sign it. The unit is:

All full-time and regular part-time editorial employees employed by Respondent at its Paterson and Union City plants, including editors, reporters, writers, chief photographers (Dispatch), photographers, librarians, desk assistants, typists and rewrite persons but excluding the executive editor, managing editor, associate editor, city edi-

tor, metropolitan editor, executive sports editor, sports editor emeritus, contract service for racing, Spanish editor, photo editor, office clerical employees, confidential employees, including the secretary to the executive editor, professional employees, guards and supervisors as defined in the Act and all other employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

(d) Bargain collectively and in good faith with Local 103 as the exclusive representative of the employees in the following unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody it in a written agreement and to sign it, upon Local 103's request. The unit is:

All composing room employees, including data processing and technical service employees employed at Respondent's Paterson, New Jersey plant but excluding all other employees, guards and supervisors as defined in the Act.

(e) Cancel, at Local 103's request, any change in rates of pay, hours, wages or other terms and conditions of employment of the employees in the composing room unit described above made on or after February 10, 1981 and reinstate those existing prior to that date but Respondent shall not be required thereby to reduce any existing rate of pay without a request from Local 103.

(f) Expunge from its records all reference to its discharge of Dale Rim as a disciplinary action and notify him in writing thereof.

(g) Preserve and upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security records, timecards, personnel records, and reports and all other records needed to analyze and compute the amount of backpay due under the terms of this Order.

(g) Post at its Paterson and Union City, New Jersey facilities, copies of the attached notice, marked "Appendix." [52] Copies of the Notice, on forms provided by the Regional Director for Region 22, after being duly signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said Notices are not altered, defaced, or covered by any other material.

(h) Mail a signed copy of the Notice to each of the composing room employees on strike at the address for each employee given Respondent by the Regional Director for Region 22.

(i) Notify the Regional Director for Region 22 in writing within twenty days from the date of this Order what steps Respondent has taken to comply therewith.

II. The allegations of the amended complaint: (1) that Respondent and T & T constitute a joint employer; (2) that Respondent violated Section 8(a)(1)(3) or (5) of the Act by failing to pay Local 103's demands for vacation pay and wages for unused personal days; (3) that Respondent violated Section 8(a)(5) of the Act by having failed to bargain collectively as to the institution of a civil action against striking employees, as to the discharge of eight reporters in October 1980 and, as to its having warned or threatened employees respecting their support for Local 103; (4) that Respondent violated Sec-

---

[52] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading, "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

tion 8(a)(1)(3)(4) or (5) of the Act by its discharge of Charles Macaluso or 8(a)(5) by its discharge of Dale Rim and (5) the allegations set out in paragraphs 32, 35, 36 and 38 of the amended complaint are dismissed.

Dated, Washington, D.C. September 24, 1982.

/s/ James F. Morton

JAMES F. MORTON
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

[SEAL] [SEAL]

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING IN WHICH ALL PARTIES WERE REPRESENTED AND AFFORDED THE OPPORTUNITY TO PRESENT EVIDENCE IN SUPPORT OF THEIR RESPECTIVE POSITIONS, IT HAS BEEN FOUND THAT WE HAVE VIOLATED THE NATIONAL LABOR RELATIONS ACT IN CERTAIN RESPECTS AND WE HAVE BEEN ORDERED TO POST THIS NOTICE AND CARRY OUT ITS TERMS.

WE WILL NOT warn our employees against discussing, or signing authorization cards for, Newark Typographical Union No. 103, International Typographical Union, AFL-CIO, (herein called Local 103).

WE WILL NOT threaten to discharge our employees if they support Local 103.

WE WILL NOT threaten to discharge or replace our employees to force Local 103 to give in to our bargaining demands.

WE WILL NOT threaten to refuse to bargain with Local 103 to discourage our employees from honoring a lawful picket line.

WE WILL NOT promise benefits to encourage our employes to solicit other employees in order to have Local 103 removed as bargaining agent of our composing room employees.

WE WILL NOT lay off employees to discourage support for Local 103;

WE WILL NOT discharge employees because they support Local 103 by having refused to perform work normally done by striking composing room employees.

WE WILL NOT refuse to reinstate unfair labor practice strikers upon their unconditional offer to return to work.

WE WILL NOT delay unduly the processing of Local 103's grievances in order to discourage employees from supporting Local 103 and in derogation of our duty to bargain collectively with Local 103.

WE WILL NOT start any lawsuits against our employees to discourage them from filing petitions for workers compensation and to discourage them from supporting Local 103.

WE WILL NOT fail or refuse to bargain collectively with Local 103 as the exclusive representative of the unit of employees described as follows:

All full-time and regular part-time editorial employees employed by us as our Paterson and Union City plants, including editors, reporters, writers, chief photographer (Dispatch), photographers, librarians, desk assistants, typists and rewrite persons but excluding the executive editor, managing editor, associate editor, city editor, metropolitan editor, executive sports editor, sports editor emeritus, contract service for racing, Spanish editor, photo editor, office clerical employees, confidential employees, including the secretary to the executive editor, professional employees, guards and supervisors as defined in the Act and all other employees constitute a unit appropriate for collective bargaining within the meaning of the Act.

WE WILL recognize, effective October 24, 1980, and upon request, bargain collectively and in good faith with

Local 103 as the exclusive representative of the unit described below with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody it on Local 103's request in a written agreement and to sign it. The unit is:

All full-time and regular part-time editorial employees employed by us at our Paterson and Union City plants, including editors, reporters, writers, chief photographer (Dispatch), photographers, librarians, desk assistants, typists and rewrite persons but excluding the executive editor, managing editor, associate editor, city editor, metropolitan editor, executive sports editor, sports editor emeritus, contract service for racing, Spanish editor, photo editor, office clerical employees, confidential employees, including the secretary to the executive editor, professional employees, guards and supervisors as defined in the Act, and all other employees constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

WE WILL bargain collectively and in good faith with Local 103 as the exclusive representative of the employees in the following unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, to embody it in a written agreement and to sign it, upon Local 103's request. The unit is:

All composing room employees, including data processing and technical service employees employed at our Paterson, New Jersey plant but excluding all other employees, guards and supervisors as defined in the Act.

WE WILL cancel, at Local 103's request, any change in rates of pay, hours, wages or other terms and conditions of employment of the employees in the composing room unit described above, made on or after February 10, 1981, and reinstate those existing prior to that date.

WE WILL expunge from our records all reference to the discharge of Dale Rim as a disciplinary action.

ALLBRITTON COMMUNICATIONS, INC.,
THE NEWS PRINTING COMPANY, INC.
and THE HUDSON DISPATCH

_____
(Employer)

By _____
(Representative) (Title)

Dated _____

THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office.

Federal Building, 970 Broad Street, Newark, N.J. 07102; Room 1600

Telephone No.: (201) 645-3652

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 84-3438, 84-3620, 84-3676

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC.,
AND THE HUDSON DISPATCH,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

NEWARK TYPOGRAPHICAL UNION NO. 103,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Intervenor.

NEWARK TYPOGRAPHICAL UNION NO. 103,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC.,
AND THE HUDSON DISPATCH,
Intervenors.

JUDGMENT

Before: ALDISERT, Chief Judge, GIBBONS, Circuit Judge, and DIAMOND, District Judge.*

---

* Honorable Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

The above consolidated causes came to be heard upon petitions filed by Allbritton Communications Company, the News Printing Company, Inc., and the Hudson Dispatch, and Newark Typographical Union No. 103, International Typographical Union, AFL-CIO, to review an order of the National Labor Relations Board issued against petitioners in No. 84-3438, and upon a cross-application of the National Labor Relations Board to enforce said order. The Court heard argument of respective counsel on June 18, 1985, and has considered the briefs and transcript of record filed in this cause. On July 8, 1985, the Court being fully advised in the premises, handed down its decision denying the petitions for review and enforcing the Board's order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Third Circuit that the petitions for review filed by Allbritton Communications Company, the News Printing Company, Inc., and the Hudson Dispatch, and Newark Typographical Union No. 103, International Typographical Union, AFL-CIO, be and they are hereby denied; and that the said order of the National Labor Relations Board in said proceeding be enforced, and that Petitioners, Allbritton Communications Company, the News Printing Company, Inc., and Hudson Dispatch, Paterson and Union City, New Jersey, their officers, agents, successors, and assigns, abide by and perform the directions of the Board in said order contained.

IT IS FURTHER ORDERED that costs shall be taxed against the Petitioners in Nos. 84-3438 and 84-3676.

BY THE COURT

/s/ Aldisert

Chief Circuit Judge

DATED: Aug. 6, 1985

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 84-3438, 84-3620 and 84-3676

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC.,
AND THE HUDSON DISPATCH,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent

NEWARK TYPOGRAPHICAL UNION NO. 103,
INTERNATIONAL TYPOGRAPHICAL UNION, AFL-CIO,
Intervenor

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges*, and DIAMOND, *District Judge* *

The petition for rehearing filed by Allbritton Communications Company, News Printing Company, and Hudson Dispatch in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the

---

* Hon. Gustave Diamond, of the United States District Court for the Western District of Pennsylvania, sitting by designation.

circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ John J. Gibbons

Judge

Dated: September 3, 1985

APPENDIX E

Section 9(c)(1) of the National Labor Relations Act, as amended, 29 U.S.C. § 159(c)(1) (1982), provides:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—
>
> > (A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in subsection (a) of this section, or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in subsection (a) of this section; or
> >
> > (B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in subsection (a) of this section;
>
> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Part 102 of the Rules and Regulations of the National Labor Relations Board, 29 C.F.R. § 102 (1985), provides in pertinent part:

> § 102.60 Petitions.
>
> (a) *Petition for certification or decertification; who may file; where to file; withdrawal.* A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed,[4] and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. Four copies of the petition shall be filed. Except as provided in § 102.72, such petitions shall be filed with the regional director for the regions wherein the bargaining unit exists, or, if the bargaining units exists in two or more regions, with the regional director for any such regions. Prior to the transfer of the case

---

[4] Blank forms for filing such petitions will be supplied by the regional office upon request.

to the Board, pursuant to § 102.67, the petition may be withdrawn only with the consent of the regional director with whom such petition was filed. After the transfer of the case to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) *Petition for clarification of bargaining unit or petition for amendment of certification under section 9(b) of the Act; who may file; where to file; withdrawal.* A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

§ 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) A petition for certification, when filed by an employee or group of employees or an individual labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent

any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the act.

(8) The name, affiliation, if any, and address of the petitioner.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(b) A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other repre-

sentatives of employees and, if so, their expiration date.

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(c) Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) Name and address of the petitioner and affiliation, if any.

(5) Name or names of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in section 9(a) of the Act.

(7) The number of employees in the unit.

(8) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(9) Any other relevant facts.

(d) A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner.

(11) Any other relevant facts.

(e) A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner.

(8) Any other relevant facts.

* * * *

§ 102.63 Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.

(a) After a petition has been filed under § 102.61 (a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in the appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be

amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under § 102.61 (d) or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this paragraph (b) shall be in conformance with §§ 102.64 through 102.68 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

APPENDIX F

A 518a

SHEA & GOULD
330 Madison Avenue
New York, New York 10017
(212) 061-3200*

May 5, 1980

Edward N. Schwartz, Esq.
715 Park Avenue
East Orange, New Jersey 07017

Re: *The Paterson Evening News*

Dear Mr. Schwartz:

I am in receipt of your letter of April 30, which was erroneously addressed to the "New York Mailers' Union". We believe it is your intention to communicate with the Newspaper & Mail Deliverers' Union of New York which this firm is counsel to.

While the Union is always prepared to fulfill its statutory obligations to meet and to bargain, we believe your request is not an appropriate one.

We understand that your client has a commercial agreement for the delivery of its newspapers with a Wholesaler with whom the Union has a contract. Under those circumstances, the Union cannot go behind the Employer with whom it has contracted and negotiate a separate agreement.

---

* Appendix F was Respondents' Exhibit 31 in the proceeding before the National Labor Relations Board. Exhibit markings and letterhead detail are omitted here.

Regardless of the financial condition of your client we recommend that you conduct discussions with the Wholesaler. It is only if those discussions directly affect contractual obligations of the Wholesaler that the Union would become involved and in that event its discussions would be limited to the Wholesaler.

Yours very truly,

/s/ Marshall E. Lippman
MARSHALL E. LIPPMAN

MEL:gaw
cc: Monte Rosenberg
Wilfred L. Davis, Esq.

BEST AVAILABLE COPY

(3)

Supreme Court, U.S.
FILED
DEC 20 1985
JOSEPH F. SPANIOL, JR
CLERK

No. 85-666

In the Supreme Court of the United States

OCTOBER TERM, 1985

ALLBRITTON COMMUNICATIONS COMPANY, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JERROLD J. WOHLGEMUTH
Attorney
National Labor Relations Board
Washington, D.C. 20530

QUESTION PRESENTED

Whether the National Labor Relations Board properly found, in the circumstances of this case, that a newspaper company was the statutory employer of the employees who worked in its mailroom and delivery operation and that the company had an obligation to recognize and bargain with the representative of those employees.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	9
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alaska Roughnecks & Drillers Ass'n v. *NLRB*, 555 F.2d 732, cert. denied, 434 U.S. 1069	14
International Ladies' Garment Workers' Union v. *Quality Mfg. Co.*, 420 U.S. 276	12
Kelley v. *Southern Pacific Co.*, 419 U.S. 318	8, 9, 10, 11, 12
NLRB v. *Al Bryant, Inc.*, 711 F.2d 543, cert. denied, 464 U.S. 1039	12-13
NLRB v. *Burns International Security Services, Inc.*, 406 U.S. 272	12
NLRB v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292	14
NLRB v. *Island Typographers, Inc.*, 705 F.2d 44	15
SEC v. *Chenery Corp.*, 332 U.S. 194	12
Sun-Maid Growers of California v. *NLRB*, 618 F.2d 56	13, 14

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:	
§ 2(3), 29 U.S.C. 152(3)	6
§ 8(a)(1), 29 U.S.C. 158(a)(1)	5
§ 8(a)(3), 29 U.S.C. 158(a)(3)	5
§ 8(a)(5), 29 U.S.C. 158(a)(5)	5
§ 10(e), 29 U.S.C. 160(e)	12
Federal Employers' Liability Act, 45 U.S.C. 51-60	10

Miscellaneous:

Restatement (Second) of Agency (1958)	10

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-666

ALLBRITTON COMMUNICATIONS COMPANY, ET AL., PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 766 F.2d 812. The decision and order of the National Labor Relations Board (Pet. App. 23a-192a) are reported at 271 N.L.R.B. 201.

JURISDICTION

The judgment of the court of appeals (Pet. App. 193a-194a) was entered on August 6, 1985. A peti-

tion for rehearing was denied on September 3, 1985 (Pet. App. 195a-196a). The petition for a writ of certiorari was filed on October 18, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

1. a. Since 1965, The News Printing Company, Inc. (The News),[1] a daily newspaper in Paterson, New Jersey, has arranged for its mailroom and delivery operation to be handled by the T&T News Company, Inc. (T&T). Before T&T performed these functions, The News had a similar arrangement with the Silk City Distributing Co., Inc. (Silk City). The mailroom and delivery employees— who were responsible for preparing the newspapers for delivery from The News' mailroom, loading the papers onto delivery trucks, and driving the trucks to deliver the papers to retail customers and distribution drop points—have been represented by the Newspaper & Mail Deliveries Union of New York & Vicinity (NMDU) since 1964, when the union was certified by the National Labor Relations Board (NLRB or Board). Pet. App. 5a, 26a-27a, 80a-86a; Pet. 3.

T&T was formed in 1965 at The News' request by two of Silk City's former employees, Peter and Louis Trombina, at little or no capital investment by them. The Trombinas agreed that T&T would work exclusively for The News and would employ the same mailroom and delivery employees who had been working for Silk City and who were represented by

---

[1] Petitioners Allbritton Communications Company, The News Printing Company, Inc., and The Hudson Dispatch were found to be a single enterprise for the purpose of this case (Pet. App. 4a, 25a), a finding which is not disputed here. References herein to "The News" include the other petitioners as well.

the NMDU. The News has provided the Trombinas with free office space, equipment, and telephone service necessary to run their business. Pet. App. 13a, 26a, 80a-81a.

Under the terms of the agreement between The News and T&T,[2] the mailroom employees and drivers handled the newspapers using The News' material and equipment, and delivered the papers in trucks provided by The News and bearing The News' logo. While T&T had responsibility for hiring, the News established the number of employees T&T was to have working on each shift, and retained the right to require T&T to hire additional employees and to demand that T&T discharge any driver, supervisor, or assistant foreman who did not meet The News' approval. Similarly, while T&T directly supervised the employees, The News established the work schedules to be maintained by T&T as well as the routes and schedules to be followed by the T&T drivers, who delivered the newspapers to customers procured by The News. T&T was responsible for maintaining its own bookkeeping and payroll. The News, however, paid T&T a weekly amount sufficient to cover employee salaries and fringe benefits as required by the T&T-NMDU collective bargaining agreement, and agreed to increase its payment whenever salaries and benefits were increased under the collective bargaining agreement. The News also paid for all operating expenses incurred by T&T, including expenses for operating and maintaining the delivery trucks, legal fees, accounting and bookkeeping costs, and a

---

[2] T&T and The News first entered into an agreement in 1966. When Allbritton purchased The News in 1977, it assumed the terms of the existing agreement which ran from 1976 to 1982. Pet. App. 5a, 26a, 84a.

guaranteed profit for the Trombinas. Pet. App. 13a (and citations to C.A. App. therein), 26a-27a, 84a-86a.

Peter Trombina negotiated the collective bargaining agreements between T&T and the NMDU. Trombina, however, secured The News' approval of the terms of agreement before signing any contract. Thus, during contract negotiations in 1979, Trombina discussed the NMDU's demands with The News' representatives, including New President Dean Singleton; he then presented The News' position to the NMDU, and secured Singleton's approval before signing the collective bargaining agreement. That agreement contained a grievance-arbitration provision binding on T&T, but grievances concerning the condition of the delivery trucks or the mailroom were routinely presented to The News for resolution. Pet. App. 5a, 13a, 27a-28a, 86a-88a.

b. Trombina also periodically acted as The News' conduit in seeking the NMDU's approval for changes which The News wished to make in its mailroom and delivery operation. In the instant controversy, for example, The News and T&T entered into an agreement in which Trombina was to seek the NMDU's approval of The News' proposal to consolidate delivery routes and reduce the size of T&T's workforce. The News agreed to pay for legal costs, including arbitration expenses, incurred by T&T, and to make any severance payments required by the T&T-NMDU contract for any employee laid off as a result of the reduction-in-force. The News also agreed that T&T's profits would not be reduced in any way. Pet. App. 13a, 31a, 86a-90a.

Trombina was unable to convince the NMDU to agree to The News' proposal to reduce the size of the

mailroom workforce, and was then also unsuccessful in his attempt to secure the reduction-in-force in an arbitration proceeding. The News' President Singleton was not happy with the arbitration result and expressed his intention to get rid of the unionized mailroom employees. Pet. App. 5a, 31a, 90a-93a.

On January 14, 1981, The News notified Trombina that he could no longer maintain the T&T corporate office in The News' building, and that T&T must vacate the facility by January 26,. On February 9, The News, without notice to either Trombina or the NMDU, brought in approximately 25 "stranger" employees to remove newspapers from the conveyor belt and insert advertising supplements into each paper. Trombina and NMDU officials protested that the "strangers" were performing union work. The News subsequently ordered Trombina and the employees out of the building. Thereafter, while the mailroom employees established a picket line outside of The News' facility, "strangers," including recently-hired security guards, completed the mailroom operation and drove the trucks along the delivery routes, as The News had already trained them to do. The News subsequently hired a new crew of mailroom employees and drivers. Pet. App. 5a, 31a, 92a-95a.

2. Upon charges filed by the NMDU, the Board found that The News violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), (3), and (5), by locking out and replacing the mailroom employees and drivers because of their affiliation with the NMDU, by changing the mailroom and delivery operation without notification and bargaining with the NMDU, and by refusing to recognize and bargain with the NMDU

as the exclusive representative of the mailroom employees and drivers (Pet. App. 31a, 46a).[3] The Board ordered The News, inter alia, to offer reinstatement with backpay to the mailroom employees and drivers, and to recognize and bargain, upon request, with the NMDU (*id.* at 51a-52a).

The Board rejected The News' contention that it bore no liability for the conduct found to be unlawful because the mailroom employees and drivers were the employees of T&T and were not employees of The News within the meaning of Section 2(3) of the Act, 29 U.S.C. 152(3). The Board found instead that T&T, "in performing the role of employer to the mailroom employees/drivers," was not an independent contractor but rather was "little more than an administrative arm of [The News]," and that "the Trombinas were managers employed by [The News] to operate the delivery system to [The News'] specifications" (Pet. App. 29a).[4] Applying the " 'right to

---

[3] The Board also found that The News committed certain unfair labor practices, and dismissed allegations of other unfair labor practices, in regard to its composing room and editorial employees, who were represented by a different union (Pet. App. 46a-48a). The Board's order respecting these matters was upheld against a union challenge by the court of appeals (*id.* at 16a-22a), but no issue regarding these findings is involved here.

[4] The administrative law judge found that The News and T&T were joint employers of the mailroom and delivery employees, but also concluded that he was collaterally estopped from deciding the joint employer issue by a federal district court ruling in a case involving The News and the NMDU (Pet. App. 96a-108a). The Board rejected the collateral estoppel finding, noting, inter alia, that "the district court later determined that it improperly asserted removal jurisdiction" (*id.* at 28a n.4). The court of appeals upheld the Board's re-

control' test" (*ibid.*) the Board explained (*id.* at 30a):

> The relationship between [The News] and T&T exhibited strongly most of the factors commonly associated with agency or employee status. T&T performed functions which were an essential part of the newspaper's operation, had a long-term exclusive working arrangement with the newspaper, carried the newspaper's product in trucks bearing the newspaper's name, conducted its operation under daily guidance from newspaper personnel and subject to unilateral changes dictated by the newspaper, had no proprietary interest in the work or the premises and equipment used to perform it, and had no opportunity to take entrepreneurial risks. See *News-Journal Co.* v. *NLRB*, 447 F.2d 65 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972). Weighed against these factors and [The News'] direct and indirect participation in labor relations matters, T&T's conduct of the lower level functions of employee management and dealing with the Union was more akin to the role performed by supervisors than that characteristic of independent contractors. *Better Building Supply Corp.*, 259 NLRB 469 (1981), enfd. mem. 707 F.2d 518 (9th Cir. 1983).

3. The court of appeals upheld the Board's decision and enforced its order. The court concluded that the Board had properly applied the "right to control" test in determining that T&T was not an

---

jection of the collateral estoppel finding (*id.* at 14a-15a), and no issue concerning that ruling is raised here. The Board also rejected the joint employer finding, noting that such a finding was incompatible with its finding that T&T was not an independent contractor (*id.* at 29a).

independent contractor and that the mailroom and delivery personnel were employees of The News (Pet. App. 10a-13a). The court rejected The News' contention that the Board had failed to apply the principles established in *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), by equating a finding of agency status of T&T with a finding that The News employed the T&T personnel. The court explained that the Board did not find a mere agency relationship between The News and T&T, but rather a master-servant relationship; "[v]iewed as such, the mailroom employees were subservants of T&T which in turn was a servant of [The News], thereby rendering [The News] the statutory employer of the NMDU workers" (Pet. App. 12a (citation omitted)).

The court of appeals also rejected The News' contention that the imposition of liability and a duty to bargain was a denial of due process because The News had never been certified by the Board as the employer of the mailroom and delivery employees. The court stated (Pet. App. 15a-16a):

> When Allbritton purchased The News in 1977, The News asserted effective control over T&T and the mailroom employees, acting as their employer for purposes of the National Labor Relations Act. The News cannot now be heard to complain that the concomitant burden accompanying this employer-employee relationship—the duty to negotiate and abide by the terms of the existing collective bargaining agreement—violates due process.

ARGUMENT

The News does not dispute that, if it was the statutory employer, its actions were illegal (Pet. App. 10a). The issue in this litigation, then, is whether the Board was correct in determining that petitioners were the statutory employers. The petition for certiorari attempts to paint the employer determination issue as involving a question of appropriate legal tests and due process. In fact, however, the case hinges simply on the facts found by the Board to support its determination; there is really no controversy over the appropriate legal standard. Since the court of appeals' decision in this fact-bound case does not conflict with the decisions of this Court or any other court of appeals, and since the appropriate legal tests to be applied have already been set out by this Court and are not in dispute, no further review is warranted.

1. Petitioners contend (Pet. 12-14) that they bear no liability for their conduct found to be unlawful by the Board—unilaterally changing the working conditions of the mailroom employees and drivers, locking out and replacing those employees with nonunion personnel, and refusing to bargain with the NMDU—because the affected individuals were the employees of T&T and not statutory employees of The News. Essentially, petitioners contend that the Board improperly failed to apply the common law test for the master-servant relationship as set forth in *Kelley* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), in determining the relationship between The News, T&T, and the mailroom and delivery employees. There is no merit to this contention.

In *Kelley*, this Court addressed the question whether an employee of a trucking company that

worked on contract for a railroad could be considered an employee of the railroad for purposes of coverage under the Federal Employers' Liability Act, ch. 149, 35 Stat. 65-66, 45 U.S.C. 51-60. The Court held that one way of establishing the three-party employment relationship would be to show that the employee was a "subservant of a company that was in turn a servant of the railroad." 419 U.S. at 324 (citations omitted). This showing would require more than proof of a traditional principal-agent relationship in which the railroad was "responsible" for the actions of its contractor. *Id.* at 325. The Court stated that it would be necessary to establish that the trucking company stood in a master-servant relationship with the railroad in which the railroad 'controlled or had the right to control the physical conduct of the [trucking company's] employees." *Ibid.*[5]

The Board's decision in this case is, therefore, fully consistent with *Kelley*. The court of appeals noted (Pet. App. 12a) that the Board did more than "find that [The News] bore mere 'responsibility' for the mailroom operations." Rather, the Board explicitly applied the "right to control" test described in *Kelley* (*id.* at 12a, 29a). It found that T&T func-

[5] The Court said that Section 220(2) of the Restatement (Second) of Agency (1958) could be "instructive" in the right to control inquiry. 419 U.S. at 324. Section 220(1) of the Restatement defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220(2) lists various factors that are helpful in applying that definition, such as: control over the details of the work, whether the one employed is engaged in a distinct line of work, skill required for the work, provision of tools and workplace, and length of time of relationship. Compare Pet. 15 n.6.

tioned as an "administrative arm" of The News, and that "the Trombinas were managers employed by [The News] to operate the delivery system to [The News'] specifications" (*id.* at 29a); as the court of appeals said (*id.* at 12a), "[t]he mailroom employers were subservants of T&T which in turn was a servant of [The News], thereby rendering [The News] the statutory employer of the NMDU workers." In short, the Board found that T&T lacked the entrepreneurial attributes and burden of risk normally associated with an independent business enterprise, and that The News controlled not only the result to be achieved—the delivery of its newspaper —but also the means and method by which the T&T employees performed the mailroom and delivery service.

Accordingly, the only issue actually raised by petitioners' contention is whether the record evidence supports the Board's finding, upheld by the court of appeals, that The News controlled or had the right to control T&T's operation to the degree necessary to be liable as the employer of the mailroom and delivery employees. This contention simply raises a question of the application of facts to settled principles of law not in dispute, and does not warrant review by this Court. The evidence set out by the Board (Pet. App. 26a-31a, 80a-96a) and the court of appeals (*id.* at 13a) amply supports the Board's finding.[6]

---

[6] The petition (at 13) concedes that the court of appeals "gave the appearance of following *Kelley*." Thus, even if it were true—and it is not—that the court was in reality following some other test, there would be no need for this court to reaffirm *Kelley*'s validity. Similarly, the petition would apparently require that the Board quote full passages from

2. Nor is there merit to petitioners' contention (Pet. 8-12) that the Board may not, consistent with due process, find The News to be the employer of the mailroom employees and drivers because it was not a party to the Board proceeding in 1964 in which the NMDU was certified as the bargaining representative of those employees and in which the predecessor of T&T—Silk City—was identified as the employer. The obligation to bargain with the representative of a unit of employees depends upon the actual relationship, at any given time, between the employees and the business entity actually functioning as the employer. The Board may properly look beyond the cosmetic appearance of corporate structure to identify the true parties to a relationship.[7] What-

---

Kelley in any decision or run the risk of having the standard used attacked. This is unnecessary; the Board said it was applying the (*Kelley*) "right to control" test, and that is enough.

The petition (at 14-16) also asserts that while the court of appeals may have applied the correct test, *it* should not have done so in light of *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947). What the court was demonstrating in listing the underlying indicia of The News' right to control, however, was that the Board's finding was, besides being consistent with *Kelley*, also supported by "substantial evidence" (Pet. App. 12a; see also *id.* at 16a-17a, 19a-20a)). In any event, since the Board applied the proper test, *Chenery* is inapposite.

Finally, as we said in our brief to the court of appeals (at 41-42), the petitioners failed to object to the Board regarding its finding that T&T was not an independent contractor and that, therefore, petitioners were the statutory employer. As a result, their challenge now to this finding is barred by 29 U.S.C. 160(e). *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

[7] See, *e.g.*, *NLRB* v. *Burns International Security Services, Inc.*, 406 U.S. 272 (1972) (successor employer); *NLRB* v.

ever the corporate interrelationships may have been in 1964, when Silk City was named in the Board certification as the employer of the mailroom and delivery employees, the fact remains that The News asserted effective control over those employees, and T&T, the nominal employer, functioned merely as its servant. Moreover, as discussed (page 4, *supra*), The News had knowledge of and became fully involved in the bargaining negotiations between T&T and the representative of those employees. Under these facts, it was not a denial of due process for the Board to impose on The News the obligation to recognize and bargain with the NMDU.[8]

Al Bryant, Inc., 711 F.2d 543 (3d Cir. 1983), cert. denied, 464 U.S. 1039 (1984) (single employer and alter ego); *Sun-Maid Growers of California* v. *NLRB*, 618 F.2d 56 (9th Cir. 1980) (joint employer). These cases also suggest the fact-bound nature of such inquiries.

[8] There is also no merit to petitioners' suggestion (Pet. 9-12) that the NMDU waived its right to bargain with The News. The NMDU letter of May 5, 1980 (Pet. App. 205a-206a), upon which petitioners heavily rely, was written in response to a letter from The News (C.A. App. 1490) (requesting that union representatives meet with The News to talk about the company's financial situation, but denying that The News had a contractual relationship with the union). The NMDU's response, stating that under the circumstances the union could not "go behind" T&T and meet with The News, could be construed as merely taking The News at its word. Nor was the NMDU necessarily on notice at that time of all of the evidence that subsequently came out in the unfair labor practice proceeding regarding the relationship between The News and T&T. There is, in any event, no reason to hold the NMDU, let alone the Board, to be estopped by a single union letter from asserting a relationship that a great deal of other evidence in this case establishes. Petitioner puts more weight on one letter, written in an ambiguous context, than it will bear.

The circumstances here are far different from those in *Alaska Roughnecks & Drillers Ass'n* v. *NLRB*, 555 F.2d 732 (9th Cir. 1977), cert. denied, 434 U.S. 1069 (1978), which petitioners assert is a conflicting decision.[9] There, a few months after the certification proceeding, the union sought to establish a bargaining relationship with an employer that had not been included in that proceeding. The court concluded that the appropriate time to determine that employer's relationship to the unit employees was the recently concluded certification proceeding and not a subsequent unfair labor practice proceeding. *Id.* at 736. Here, by contrast, the certification proceeding was long ago and remote from the record, and the relationship between the "new" employer and the union resulted from The News' own conduct over an extended period of time. Unlike *Alaska Roughnecks*, then, it cannot be said here that the alleged violation occurred "before [petitioners'] having either notice of [their] alleged status as employer, or any duty to bargain." *Ibid.* The notice and duty had long existed.[10]

---

[9] Cf. *Sun-Maid Growers of California* v. *NLRB*, 618 F.2d at 59 (a later Ninth Circuit decision distinguishing *Alaska Roughnecks*).

We stressed the "rather unusual facts" of *Alaska Roughnecks* in our memorandum to this Court in that case; because the case was tied to those facts, we did not petition for certiorari. Memorandum for the NLRB at 4, *Alaska Roughnecks & Drillers Ass'n* v. *NLRB*, *supra*.

[10] Petitioners' reliance on *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), is misplaced. This Court held only that an employer cannot be found to have refused to bargain when its employees' representative did not make a request to bargain. *Id.* at 297-298. Here the NMDU made clear its objections to the changes in the operation of the mailroom and, on the facts of this case, was actually bar-

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel

JERROLD J. WOHLGEMUTH
Attorney
National Labor Relations Board

DECEMBER 1985

---

gaining about them with The News, through T&T (Pet. App. 90a-94a). Petitioners' citation (Pet. 8) to *NLRB* v. *Island Typographers, Inc.*, 705 F.2d 44 (2d Cir. 1983), is inapposite for the same reason.

Petitioners also assert (Pet. 10-11) that the NMDU should have sought to formalize The News' status earlier, but it is irrelevant that the NMDU did not complain about its employer's actions until it had reason to. And, as discussed (pages 13, note 8, *supra*,) the NMDU may not always have been aware of the relationship between The News and T&T.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20111

Supreme Court, U.S.
FILED
JAN 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-666

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC., and
THE HUDSON DISPATCH,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

REPLY MEMORANDUM FOR PETITIONERS

RICHARD W. BECKLER *
KEITH A. JONES
DAVID M. FOSTER
STEPHEN M. MCNABB
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800
Counsel for Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

CASES: Page

Alaska Roughnecks and Drillers Association v. NLRB, 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978) 3
Kelley v. Southern Pacific Co., 419 U.S. 318 (1974) 4
NLRB v. Columbian Enameling & Stamping Co., 306 U.S. 292 (1939) 2
SEC v. Chenery Corp., 332 U.S. 194 (1947) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-666

ALLBRITTON COMMUNICATIONS COMPANY,
THE NEWS PRINTING COMPANY, INC., and
THE HUDSON DISPATCH,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*,
Respondents.

REPLY MEMORANDUM FOR PETITIONERS

---

1. In its petition, The News showed that the opinion below conflicts with decisions of this Court and other courts of appeals on a fundamental question relating to the duty to bargain. Pet. 8-12. Those decisions establish that, as a matter of both statutory construction and due process, a company may not be penalized for failing to bargain with a labor union that had refused to deal with the company, especially where, as here, the National Labor Relations Board had designated a different company as the employer. In its response, the Board treats this issue solely as a matter of due process and argues that The News had been given adequate notice of its bargaining obligation to satisfy constitutional requirements. Br. in Opp. 12-14. That response largely misses the point and is wrong to boot.

The threshold issue in this case is statutory, not constitutional. This Court in *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292 (1939), and the lower courts in subsequent cases have articulated rules that derive in the first instance from the bilateral nature of the statutory bargaining relationship. These rules are based on the recognition that Congress, when it subjected the employer and labor union to a common duty to bargain, intended that there could be no breach of that duty by one party when the other had given no indication of a desire or willingness to bargain. *Id.* at 297. The labor union in this case, the NMDU, not only failed to indicate a desire or willingness to bargain; it obtained from the Board a certification of a different company as the employer and it informed The News in writing that it would not meet with The News or deal with it as an employer.[1] In those circumstances, the statute did not require The News to consult with the NMDU before making operational changes.[2] There was, in short, no breach of the statutory duty to bargain. By casting the issue

---

[1] The Board halfheartedly seeks to excuse the NMDU's refusal to deal with The News by speculating that the union may not have been aware of facts that the Board itself subsequently relied upon in finding The News to be the statutory employer. Br. in Opp. 13 n.8. Such speculation is beside the point. The determinative fact is that the union had denied the existence and precluded the formation of the bilateral relationship upon which the duty to bargain depends.

[2] The Board seeks to distinguish *Columbian Enameling* by claiming that the NMDU "had made clear its objections to the changes." Br. in Opp. 14 n.10. That claim is both irrelevant (for it does not alter the fact that the NMDU had refused to meet with The News) and factually incorrect. The portions of the record cited by the Board deal with T&T's efforts to negotiate route reductions and manpower cuts with the NMDU. *See* Pet. App. 90a-94a. This case, by contrast, grew out of The News' decision to hire certain workers of its own to insert advertising supplements. There is no suggestion in the record that these hirings would have necessitated reductions in the NMDU's routes or manpower levels.

solely in constitutional terms, the Board has sought to divert attention away from this threshold statutory issue.[3]

The constitutional issue arises only if it is determined that, notwithstanding *Columbian Enameling*, there can be a breach of the statutory duty to bargain in the circumstances of this case. Then a substantial question of due process is squarely presented: does a company have fair notice of its bargaining obligation when a labor union has refused to deal with it and has named a different company as the employer during certification proceedings? This question was resolved against the Board in *Alaska Roughnecks and Drillers Association v. NLRB*, 555 F.2d 732 (9th Cir. 1977), *cert. denied*, 434 U.S. 1069 (1978).

The Board attempts to distinguish *Alaska Roughnecks* on the ground that the inconsistent certification in that case occurred "a few months" before the alleged failure to bargain, whereas the Board certified T&T's predecessor (rather than The News) twenty years ago. Br. in Opp. 14. But the longstanding nature of the NMDU's bargaining relationship with T&T and its predecessor simply compounds the unfairness of penalizing The News for failing to bargain. A company should not have to anticipate, at its peril, a sudden change in a decades-old bargaining relationship.[4]

The Board makes the unsupported assertion that "notice . . . had long existed" of The News' alleged bargain-

---

[3] Indeed, the Board even states, quite incorrectly, that "The News does not dispute that, if it was the statutory employer, its actions were illegal." Br. in Opp. 9. That dispute lies at the heart of the question presented under *Columbian Enameling*.

[4] The Ninth Circuit's subsequent decision in *Sun-Maid Growers v. NLRB*, 618 F.2d 56 (9th Cir. 1980), does not cast doubt upon *Alaska Roughnecks*. In *Sun-Maid*, the court pointed out that the union's representation "was not the result of Board certification" and that the employer had willfully misled the union about its plans. 618 F.2d at 59. Those factors were absent in *Alaska Roughnecks*, as they are here.

ing obligation. Br. in Opp. 14. The facts are precisely otherwise. The NMDU, which had ample opportunity to ask the Board to designate The News as the employer, never did so; instead, it left intact its designation of a different company as the employer.[5] The NMDU then went out of its way to deny the existence of any bargaining relationship with The News. Pet. App. 205a-206a. There was no constitutionally adequate notice.

2. The News further showed that the decisions below and this Court's decision in *Kelley v. Southern Pacific Co.*, 419 U.S. 318 (1974), establish conflicting standards of employment under the National Labor Relations Act ("NLRA") and the Federal Employers' Liability Act ("FELA"). Pet. 12-14. The Board denies this, Br. in Opp. 9-11, but its very response demonstrates that neither the Board nor the Third Circuit applied the *Kelley* test. Neither the Board nor the Third Circuit directed its attention to the "right to control . . . physical conduct." 419 U.S. at 325. The Board never cited *Kelley*; instead, it recited a laundry list of factors that had nothing to do with control of physical conduct. *See* Pet. 15 n.6. The court of appeals similarly failed to examine control of physical conduct, relying instead on a vague "right to control" test that did not distinguish between agents and employees. Thus, this case squarely presents the question whether the test for employment under the NLRA is the same as that prescribed by *Kelley* under the FELA or, instead, is the generalized test applied below and actually rejected by the majority in *Kelley*.

3. Even if the court of appeals correctly stated the test for employment under the NLRA, its decision vio-

---

[5] The Board deals with this point only by saying that "it is irrelevant that the NMDU did not complain about its employer's actions until it had reason to." Br. in Opp. 14 n.10. That statement is a red herring. The designation of a new employer is not a "complaint." The question is one of notice—the NMDU could have given notice by requesting designation of The News, but it chose not to do so.

lated a basic rule of administrative law: instead of remanding to the Board for application of the correct test, the court erroneously assumed the responsibility for finding "facts" and determining in the first instance the existence of a master-servant relationship between The News and T&T. Pet. 14-16.[6] The Board now compounds this error by resting its description of the case not on its own findings but on the improper and erroneous "findings" of the court of appeals. *Compare, e.g.*, Br. in Opp. 3-4 *with* Pet. 16.

It is appropriate to recall the facts in detail:

> The News has no ownership interest in T & T. There are no common directors or officers. Bank accounts and books are kept and were kept separately and there is no movement of money indicating financial dependence or control other than the debt obligations incurred in the normal course of business arising out of the contract between the parties. No personnel of the News negotiates [*sic*] with the union, meet with union officials or are involved in labor relations.

---

[6] The Board now contends that it applied the correct test itself when it stated that "T & T was little more than an administrative arm of [the News]; the Trombinas were managers employed by [The News] . . . ." Br. in Opp. 11 (quoting Pet. App. 29a). In fact, the Board's analysis was hopelessly confused:

> . . . T & T was not an independent contractor but the agent of [The News] . . . .
>
> The "right to control" test used to determine whether a person is an independent contractor is the same whether independent contractor status is urged as alternative to employee status or to agent status. The relationship between [The News] and T & T exhibited strongly most of the factors commonly associated with agency or employee status.

Pet. App. 29a-30a (citations omitted). It therefore is clear that the Board did not know and did not care whether T & T was merely a servant; the Board thought that its task was at an end when it found that T & T was an agent. But agency and employment are not synonymous concepts. *See Kelley*, 419 U.S. at 325.

> T & T hires, fires, and handles all personnel problems and grievances with a minor provisions [*sic*] already set forth in respect to the contract; recognizing that the trucks used by T & T are leased by the News, nevertheless T & T pays its own general liability insurance, Workers Compensation Insurance and other business insurance.
>
> T & T pays the drivers on its own checks and takes out withholding and remits that to the appropriate agency. T & T is responsible for the direction of its drivers and assignments of particular routes, although the routes are determined by the News.
>
> T & T has input into their determination. A letter from the union corporate counsel indicates that the union recognizes T & T and not the News as the party to its contract . . . .
>
> Regarding discussions between the News and T & T, the union counsel noted that, "Only if those discussions directly affect contractual obligations of the wholesaler"—T & T in this case—"would the union become involved, and in that event its discussions would be limited to the wholesaler."

Pet. App. 98a-99a.[7] In view of these facts, the administrative law judge refrained from finding T & T to be a mere servant. *Id.* at 106a. The Board did not reject his findings; it determined only that T & T was "the agent of [The News]." *Id.* at 29a. When the court of appeals then determined on its own that T & T actually was a servant of The News, it was departing, quite obviously and erroneously, from the rule announced in *SEC v. Chenery Corp.*, 332 U.S. 194 (1947).[8]

---

[7] These facts were found in the first instance by the United States District Court for the District of New Jersey in separate litigation between the NMDU and The News and were set forth without disagreement by the administrative law judge in this case.

[8] The Board incorrectly suggests that section 10(e) of the NLRA, 29 U.S.C. § 160(e), prevents judicial review of the determination

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

RICHARD W. BECKLER *
KEITH A. JONES
DAVID M. FOSTER
STEPHEN M. MCNABB
FULBRIGHT & JAWORSKI
1150 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 452-6800

Counsel for Petitioners

* Counsel of Record

---

that The News employed T&T's drivers, because The News "failed to object to the Board." Br. in Opp. 12 n.6. Section 10(e) simply states that "[n]o objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court." The administrative complaint alleged that The News employed the drivers of its "agent" T&T; The News denied that allegation in its answer; the parties litigated and fully briefed the issue before the administrative law judge; and they fully briefed it again before the Board.